Date: May 18, 1999

Case No.: 1997-TSC-6
File No.: 0-130-97-007

In the Matter of:

Jeanne Sayre,
Complainant

v.

Alyeska Pipeline Service Co.
and
VECO Engineering,
Respondents

For the Complainant:
A. Alene Anderson, Esq.
Sarah L. Levitt, Esq.

For the Respondent, VECO Engineering:
Mary L. Pate, Esq.

For the Respondent, Alyeska Pipeline Service Co.:
Charles P. Flynn, Esq.
Thomas P. Owens, III, Esq.

Before:
DAVID W. DI NARDI
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the employee protection provisions of the Toxic Substances Control Act, 15 U.S.C. § 2622, the Water Pollution Control Act, 33 U.S.C. § 1367, the Clean Air Act, 42 U.S.C. § 7622, the Solid Waste Disposal Act, 42 U.S.C. § 6971, and the implementing regulations found at 29 C.F.R. Part 24 and Part 18. The following abbreviations shall be used herein: ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Complainant's Exhibit, JX for a

Joint Exhibit, VECO for an exhibit offered by Respondent VECO Engineering, and APSC for an Exhibit offered by Respondent Alyeska Pipeline Service Company.

On April 4, 1997, Jeanne Sayre (Complainant) filed a complaint of retaliation against Alyeska Pipeline Service Company (Alyeska) and VECO Engineering (VECO) (conjunctively referred to as Respondents). (CX 10) Alyeska operates and maintains the Trans-Alaskan Pipeline on behalf of owner companies and contracts some of its work out to various contractors; one such contractor is VECO Engineering. The Complainant, a VECO Field Designer, alleges that the Respondents unlawfully harassed her and terminated her employment on March 24, 1997, in retaliation for her engaging in certain protected activities. (ALJ EX 2) The complaint was referred to the Office of Administrative Law Judges under cover of letter dated May 12, 1997. (ALJ EX 1)

By document filed August 5, 1997, Complainant submitted an Amended Complaint, alleging that Respondents failed to re-hire Complainant for at least thirty-five (35) positions for which she was qualified, but not selected. (ALJ EX 15) This Judge determined that it was judicially efficient and procedurally proper to accept the Amended Complaint. (ALJ EX 22)

A hearing was held before the undersigned from October 5-9, 1998 and October 13-14, 1998 in Anchorage, Alaska. (ALJ EX 68) All parties were present, had the opportunity to present evidence and to be heard on the merits.

Post-Hearing Exhibits

The following post-hearing evidence has been admitted into the record:

Exhibit No.	Document Filed	Date Filed
VECO 67	VECO's Non-Opposition to Alyeska's Motion for Summary Judgment and Joinder in Blacklisting Portion of Motion for Summary Judgment; Motion in Limine to Exclude Any Evidence of Lost Wages and Cobra Premiums	10/05/98
CX 93	Second Amendment to Complainant's Pre-Hearing Report	10/16/98
CX 94	Complainant's Notice of Filing Exhibit 92(a), Scheele Deposition, Page 27	10/19/98
APSC 39	Alyeska Pipeline Service Company's Notice of Submitting Additional Hearing Exhibits	10/27/98

JX 3	Notice from the parties that transcripts were received	11/18/98
APSC 40	Unopposed Motion for Extension of Time to File Post Trial Briefs	12/05/98
ALJ EX 117	Order Granting Unopposed Motion	12/07/98
APSC 41	Notice from Respondent Alyeska that brief was sent	12/21/98
ALJ EX 118	Letter from Complainant's former counsel, Attorney Billie Pirner Garde, requesting time to file attorney fee petition	12/21/98
VECO 68	Post-Hearing Brief of Respondent VECO Engineering	12/23/98
APSC 42	Alyeska Pipeline Service Company's Post-Trial Brief; Proposed Findings of Fact and Conclusions of Law; Proposed Order and Microsoft Word 6.0 Disk	12/23/98
ALJ EX 119	Order Granting Attorney Garde's Request	12/23/98
CX 95	Complainant's Post-Hearing Submission	12/24/98
CX 96	Declaration of Sarah L. Levitt, Esq.	12/24/98
CX 97	Substitute Declaration of Sarah L. Levitt, Esq.	12/28/98
VECO 69	VECO Engineering's Unopposed Motion for Extension of Time to File Reply to Complainant's Post-Hearing Submission	12/30/98
ALJ EX 120	Order Granting Extension for Filing of Reply Briefs	01/04/99
APSC 43	Alyeska Pipeline's Reply to Complainant's Request for Damages and Other Relief	01/08/99
VECO 70	VECO Engineering's Reply to	01/11/99

	Complainant's Demand	
APSC 44	Notice of Citation of Recent Supplemental Authority	01/15/99

The record was closed on January 15, 1999, as no further documents were filed.

I. Summary of the Evidence

Complainant was employed as a designer by VECO in 1994, and was assigned to work at the Kuparuk Oil fields in Prudhoe Bay. (TR 120, 836-38). In late 1995, VECO transferred Complainant to perform design services for Alyeska at Pump Station (P.S.) 3.[1] Currently, Complainant is employed by VECO as a senior designer for VECO at P.S. 7.

Alyeska is a joint venture company owned by several entities.[2] Alyeska's purpose is to design, construct, operate and maintain the Trans-Alaska Pipeline System under various Right of Way Agreements. (CX 85) The pipeline itself runs approximately 800 miles from Prudhoe Bay to Valdez, Alaska. (JX 1)

VECO is an alliance contractor that provides engineering services to Alyeska, including design and drafting support services for engineers at remote pump stations operating along the Trans-Alaska Pipeline. (VECO 30; TR 1220-21) VECO drafters and designers provide, inter alia, red-line drawing support, general drafting assistance, and assistance with up-date changes. (TR 1220) At all relevant times, VECO employees were involved with up-dating the pump station drawings to create an accurate set of "as built" drawings representing how the facilities were built and modified at the Pipeline. (TR 1239-40; TR 1156-58)

As noted, in September of 1995, Complainant was transferred to a position at P.S. 3, which was part of the then-titled, Northern Business Unit ("NBU") of the pipeline, which comprised Pump Stations 1 through 4. P.S. 3 was located in a remote location, approximately 100 miles south of Prudhoe Bay, where the temperature was often well below zero, and there was limited daylight. (TR 997-98) The pump station consisted of a large tank farm, that was surrounded by control, power and communication facilities, as well as office and housing structures. (TR 995) Complainant was working a two-week-on/two-week-off rotation, meaning that she would work and live at P.S. 3 for two weeks, working at least twelve hour days, and then have two weeks R&R. Alyeska provided

[1] Complainant was hired into a four month position, which was subsequently extended to last a little over a year. (VECO 35; TR 247)

[2] Alyeska is comprised of: Amerada Hess Pipeline Corporation, ARCO Transportation Alaska, Inc., BP Pipeline (Alaska), Inc., Exxon Pipeline Company, Mobil Alaska Pipeline, Philips Alaska Pipeline Corporation, and Unocal Pipeline Company. (VECO 30).

food and housing, and Complainant was compensated at time and a half for weekends and overtime on single week days. (TR 123, 131)

Complainant, while working at P.S. 3, was an employee of VECO, but received little supervision from VECO. Mr. Steven T. Read, electrical instrumentation design tracking supervisor for VECO, was Complainant's supervisor from 1996 through 1997. As such, Mr. Read provided administrative supervision in duties pertaining to VECO, such as performance reviews and financial issues. Mr. Read described himself as the "functional supervisor," which issued day-to-day work and made sure that the schedules were met. Mr. Read was not informed of how much work Complainant was doing, although he did complete her performance reviews. In fact, in the entire time Complainant was stationed at P.S. 3, Mr. Read only visited one time. (TR 586) The day-to-day work activities were overseen by an Alyeska supervisor, however, Mr. Read stated this person "really wouldn't be a supervisor." (TR 666)

Complainant testified that her day-to-day supervision came from Alyeska. In January and March of 1996, Complainant attended the Alyeska required Quality Control Training. (TR 128, 133-35) Further, she testified that Alyeska was in charge of her working schedule and owned, managed, and operated all the facilities and equipment at P.S. 3. (TR 123) Complainant reported to two Alyeska Area Team Leaders (ATLs), Betsy Haines and John Hilgendorf, regarding her day-to-day activities, as well as several Alyeska Engineers. (TR 122-23, 666-67, 772-74, 943)[3] An ATL runs the pump station and, in addition to other duties, is responsible for the "safety of the people there, supervision of the Alyeska employees and [has] responsibility for the contractors on-site, and financial responsibilities as well." (TR 771-72) ATL Haines testified that she was responsible for ensuring that Complainant fulfilled the requirements of her written work orders, and complied with all of the regulations and safety requirements of the station. She clarified, however, that she was not specifically responsible for Complainant's day-to-day tasks. That responsibility, according to ATL Haines, belonged to Glen Pomeroy and Joe Dwyer, Alyeska's maintenance advisors, stationed at P.S. 1. (TR 772-73) ATL Haines, however, retained the broader responsibility of assigning Complainant's categories of work, such as minor modification work. Mr. Read described Alyeska Engineer D. Gregory Kinney as a "lead" supervisor to Complainant because he was one of the station engineers assigned to P.S. 3, and Complainant would be taking her directions directly from the station engineers. (TR 703)

Complainant's duties at P.S. 3 were to address some backlog and design issues faced by Alyeska. The facility system drawings at the pump stations were "an uncoordinated jumble," in the words of Alyeska's post-hearing brief. (APSC 42 at 9) At the time, Alyeska had an extreme back log of design work, and needed to complete a single set drawings which accurately reflected the current

[3] The Alyeska Engineers who supervised Complainant, included: Greg Kinney from P.S. 3, Paul Butter from P.S. 1, Kevin Scheele from the Drafting Update Program, and Jerry Jost from VECO. (TR 123-24) Complainant also assisted technicians in researching drawings or documentation, performed training for Alyeska technicians on red-lining drawings and procedures, and she updated stick files and aperture cards. (TR 127)

reality of the pipeline. (TR 797)[4] The scope of the pump station drafting need was enormous The backlog of drawings that needed to be checked, revised by redlining, annotated and incorporated into an integrated master drawing set numbered in the thousands along the pipeline, with several hundred at Pump Station 3 alone. (TR 797-98) Furthermore, the drafting need increased as a normal function of pump station operation which regularly generated new drawings to be checked, red-lined and incorporated. (TR 801) As a Designer/Drafter at P.S. 3, Complainant's responsibilities included both drafting and designing functions. (TR 126-30) The drafting side of her job involved up-dating engineering drawings, so that the drawings reflected the actual field condition of the facilities.

In addition to drafting work, ATL Haines initially assigned Complainant to perform design work on "minor modification packages." (TR 129) This involved minor adjustments or changes to systems which could not be repaired or maintained with "in-kind" (e.g., substantially identical) part replacements. As much as half of Complainant's time, prior to October of 1996, was spent working as a minor modification designer. (TR 799) Complainant's minor modification work required her to work closely with pump station engineers, including D. Greg Kinney, Jerry Jost, Paul Butter and Kevin Scheele, who had the final authority to designate and approve minor modification packages. (TR 123-26)

Complainant's first year working at P.S. 3 resulted in several positive reviews and some minor conflicts or issues.[5] In July of 1996, Mr. Read performed a performance review of Complainant,

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[4] A major issue that Alyeska sought to address during 1996, was the need to create a current set of "as built" drawings for the Pipeline and its associated facilities. Over the twenty year history of the Pipeline, modifications had been made, but the documentation for those drawings had not been kept up. Alyeska was therefore engaged in a series of different programs to bring the documentation current. This involved integrating the "red line" changes which had been made into the original drawings, and producing a new set of drawings which showed the current condition. "Red lines" denote markings on the system drawings which indicate changes from the original configuration of those systems. Much of the work was performed with computer assisted drawing software (AutoCAD). Complainant's responsibilities involved verifying the markings, to assure that they reflected the condition of the system in the real world, and to integrate the redlines into new "as built" drawings.

[5] During her early employment with VECO, Complainant had disagreements with VECO about her transfer from the ARCO contract at Kuparuk to the Alyeska contract at P.S. 3.

Additionally, during 1995, Complainant volunteered to work overtime on her R&R. Then in late 1995, Alyeska gave out incentive bonuses to VECO employees working on the Alyeska project. The bonus was based upon the amount of time each individual had spent on the project. Because Complainant was new to the project, she received a smaller bonus. Complainant was unhappy about this and on December 20, 1995, she wrote to Mr. Read informing him that she would immediately cease working overtime on her R&R. (VECO 37; TR 250-51, 845)

speaking with a number of co-workers[6] who were "very pleased" with her work. (CX 22)[7] Mr. Read's performance review did reference two prior issues that had been encountered involving Complainant missing training that occurred on her R&R, and his difficulties obtaining Complainant's time cards over a couple of months.[8] Mr. Read's review, however, concluded that those issues had been rectified and he recommended that she be promoted to Senior Designer. (CX 19; VECO 39)[9]

In conjunction with her performance review, Complainant completed a self-evaluation and found her performance superior in every subject, with the exception of two: she rated herself very good in regard to cooperation with people and supervisors. (VECO 41) Complainant also described her working relationship with John Reynolds, an electrical engineer at Alyeska, Paul Carson, Phil Mann and Dave Hackney, Mr. Kinney's alternates, as excellent. Additionally, Mr. Kinney, who shared an office trailer with Complainant, testified that, at this time, their office relation was "very friendly" and supportive, and he described their working relationship as "outstanding." (TR 1000)

Arrival of the DUP Team

As noted, Alyeska was facing a crisis in backlog work at all pump stations, while trying to maintain its current design and drafting needs. At P.S. 3, for example, Complainant was the only Senior Drafter and had no alternate to work the two weeks she was on R&R. Further, one half of her time was spent on minor modifications, so that only one week a month was available to reduce the back log problem. (TR 801-02) In response to this need, in early to mid-1996, the ATLs invited

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[6] Those consulted were Bob Stirling, Greg Kinney, Paul Butter and John Hilgendorf.

[7] I pause to note that in April of 1996, Mr. Read presented Complainant with a performance review that was completed by Mr. Read after speaking only with Mr. Rob Shipley. Complainant expressed unhappiness about this review since neither Mr. Read nor Mr. Shipley were in her office and they were largely unaware of her work habits. Complainant requested that Mr. Read speak with the engineers and ATLs of the NBU. (TR 253, 849-50) As a result, the second evaluation was issued in July of 1996. (CX 22; CX 38)

[8] Complainant had refused to turn in her time slips because the Internal Revenue Service had "erroneously slapped" a lien on her and would have garnished her wages. (TR 74, 843-44) This dispute was resolved in December 1995 or January 1996. (TR 345)

[9] The record contains evidence that Complainant was unhappy with her promotion and refused to sign the performance review, as she felt she should have received a two-grade promotion to Principal Designer. (TR 852, 906-07) According to Mr. Read, Complainant believed that his failure to promote her to principal designer was based on her gender. (TR 907) Shortly thereafter, Complainant filed and EEOC complaint based on this action. Mr. Read testified that this is the only time in his career that an employee was unhappy with a promotion and a pay raise. (TR 907) Further, he testified that he had never promoted anyone from designer to principal designer, because the employee must be a senior designer in between.

the Drafting Update Program (DUP) to work at the pump stations. (TR 798-802) The DUP team arrived at P.S. 3 in September of 1996, and was headed by Julie Stinson and Ken Peacock. (TR 1159) They utilized P.S. 3 as the pilot station for their effort to integrate all pump station drawings into one master set of current computerized drawings. (TR 798, 800, 1159)[10] ATL Haines stated that Complainant was assigned to the DUP project part-time, and that it was understood that she would work hand-in-hand with the DUP team. (TR 150, 816, 821-22) In fact, Ms. Stinson stated that her understanding, gained through ATL Haines, was that Complainant was assigned to the DUP project "to act as a team member." (TR 1159) Complainant testified to the tasks she performed for the DUP team, including: making plots, drafting, as-builting, valve verification and filing of documentation. (TR 1370-71) She testified that she never refused to perform any work with or for the DUP. (TR 1371) Nevertheless, the relationship between the DUP team and Complainant quickly soured.[11]

Prior to the DUP team's arrival, Complainant worked in a trailer which she shared with Mr. Kinney. (TR 136) Ms. Stinson, however, acknowledged that the arrival of the DUP unit included "substantial" changes for Complainant. (TR 1160) The DUP team practically doubled the number of people in Complainant's work environment, and greatly increased the number of individuals seeking access to the drawings, printers and plotters at the trailer where Complainant and Mr. Kinney worked. The DUP team, as Ms. Stinson described, "pretty much were everywhere." (TR 1161)

The main conflicts between Complainant and the DUP team concerned access to Complainant's office and computer equipment. As noted, Complainant's office had a computer with the computer assisted drawing (AutoCAD) software which was used to update pump station system drawings which had been red-lined with changes. In addition, there was a special printer capable of printing large-sized documents. Complainant, however, placed locks on her door when she was not at her office, hung signs around her office, and placed multiple passwords on her computer. These steps seriously limited access to the equipment in Complainant's trailer, and created friction with the DUP team.

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[10] Mr. Glen Pomeroy testified that the purpose of the DUP program was to update the drawings and to assure that the red lines matched the facility. The DUP team comprised fifteen to twenty engineer-related employees of Alyeska, or its subcontractors, such as VECO or Management Associate Consultants (MAC).

[11]Ms. Stinson testified that her relationship with Complainant started out "stiff" and then seemed to deteriorate. (TR 816) Ms. Stinson testified that Complainant was hostile almost from the start to the DUP team, and that Complainant refused to work with them or provide assistance. (TR 162-63, 1032-33) Ms. Stinson stated that in the hallway, Complaint would look down and pass people. "I used to say hello, but then, after you kind of get ignored, you start acting like that too." (TR 1180) This led Ms. Stinson to conclude that Complainant would not help with the project, and they would just work around her. Even so, there was still some continuing interaction necessary, for example when the needed plots. She testified that the DUP team tried to avoid contact with Complainant, and they would argue over who would have to deal with Complainant.

Ms. Stinson testified to the problems faced as a result of Complainant's locks and passwords. She explained that Complainant would padlock her office every night and that she had taken steps to prevent Ms. Stinson and the DUP team from obtaining computer access, by changing her passwords once Stinson learned of them. (TR 626, 697-99, 1169, 1190) This became a problem with printing because DUP team members needed to have accessibility to a printer on a constant basis. To remedy this situation, the printer was networked, and removed from Complainant's office into a common area so that anyone in the trailer could use it. (TR 1162) Ms. Stinson also testified about a number of signs which Complainant hung in her office, (APSC 2)[12] and felt that Complainant was taking a proprietary tone in regards to her office and equipment. (TR 1172)

Complainant, however, testified that in May of 1996, quality records were removed from her office, and she reported this to Howard Robertson, acting ATL. At this time ATLs Robertson and Haines authorized Complainant to place a lock on the door to her office. (TR 137-138) The agreement was that the ATLs would have a key to the lock in the drawer in their office. She testified that she did not have a proprietary interest in her office equipment and that it belongs to Alyeska. (TR 1367) Subsequently, Complainant was informed by Mr. Read on January 8, 1997 that all locks were being removed from all offices in the NBU. (CX 9)

Another conflict arose concerning the Complainant's placement of multiple passwords on her computer. Ms. Stinson requested that Complainant provide her with the password, but Complainant refused, stating to do so would violate the Alyeska code of conduct.[13] Complainant alleged that she had confirmed that with Alyeska's Business Practice Office (BPO), however, Ms. Stinson stated that she contacted Lynette Fox at the Alyeska's BPO, who stated that Complainant's statement was a misinterpretation of the code of conduct. (CX 60) Mr. Read and Ms. Stinson noted that Complainant would periodically provide her password to the ATLs , but that she would also be

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[12] The record contains copies of signs hung by Complainant that read: "PLEASE **DO NOT** REMOVE ANYTHING FROM THIS OFFICE"; "******ATTENTION****** DO NOT USE THIS COMPUTER UNLESS YOU ARE ON THE ATL'S AUTHORIZATION LIST"; "**DO NOT ENTER!!! AUTHORIZED PERSONNEL ONLY !!**"; and "**ATTENTION** THIS IS NOT A PUBLIC ACCESS COMPUTER TERMINAL. PLEASE DO **NOT** ATTEMPT TO OVERRIDE THE PASSWORD. ALYESKA HAS A STRICT POLICY ON THE PROTECTION OF PERSONAL PASSWORDS GIVEN TO INDIVIDUALS ACCESSING ALYESKA'S COMPUTER DATA/INFORMATION AND IT IS THE ABOVE MENTIONED INDIVIDUALS RESPONSIBILITY TO **KEEP** THEM CONFIDENTIAL." (APSC 2)

[13] Apparently, Complainant originally provided her password to Ms. Stinson, but later changed the password. After first providing the password, Complainant spoke with Karen Chamberlain, who told Complainant not to provide her password to anyone. It is not clear whether or not Ms. Chamberlain knew that the DUP team was also working at P.S. 3 at that time or whether or not she intended this comment to refer to Ms. Stinson. Nevertheless, the next time Ms. Stinson requested Complainant's password, she was denied, and Complainant told her to call Ms. Chamberlain.

changing her password so that it would soon be outdated. (TR 697-99; 1168-69) Mr. Pomeroy, however, testified that he instructed Ms. Stinson that if she were having trouble gaining access to Complainant's computers, that she should speak with the ATLs, which she never did. (TR 1267)[14] ATL Haines did not inform the DUP that Complainant had permission to have the lock on her door, or that Complainant had discussed the lock and computer password with the ATLs. (TR 790)

Complainant testified concerning her alleged reasons for password protection and her reluctance to make the passwords available. In May of 1996, Complainant raised a concern to ATL Haines that individuals were going into her office and using telephones and installing non-approved software on her computer, which caused configuration problems with the AutoCAD program. ATL Haines allowed Complainant to install disc lock software and to issue a spreadsheet which identified who was authorized to have the password on the machine, who was authorized for the plotter, and who was authorized for the printer. (TR 137) Complainant then met with Karen Chamberlain in December 1996, when people from the DUP program wanted to access her computer. (TR 380-381) Ms. Chamberlain, the computer support administrator in the NBU, instructed Complainant not to give her password out to anybody, but to give Ms. Chamberlain's name to the person and she would determine whether or not they needed access to Complainant's computer terminal. (TR 138)[15] Accordingly, Complainant testified that per Ms. Chamberlain's instructions, and the Alyeska Code of Conduct (EX 31), it was her belief that she was not able to give her password out.

Complainant testified that she was never asked by an ATL to remove or give up her computer password. (TR 1365) She was asked, however, by Ms. Stinson, Mr. Read, and Mr. Rooney. (TR 1365) Her response to them was that they should speak with Karen Chamberlain. (TR 1365) She stated that if the ATL had asked for either her password, or to remove the lock on her office, she would have done so. (TR 1366)

In November of 1996, Mr. Demming, manager of engineering for VECO, sent a prof to all of Discipline Engineering indicating the need for all VECO employees to provide their supervisors with their computer passwords. (TR 854-55; CX 31) A follow-up memorandum was sent by George Rooney, VECO's Field Engineering Supervisor.[16] Mr. Read testified that it was fine for Complainant to have a password, so long as her computer was accessible while she was off duty. (TR 695) Mr.

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[14] When asked on cross-examination, Ms. Stinson noted that it is possible that the ATL could have ordered Complainant to give the password or keys and that it would cease being a reoccurring problem. (TR 1209)

[15] According to ATL Haines, Ms. Chamberlain did not have the authority or the responsibility for determining who did and who did not have access to the computer resources at P.S. 3. (TR 815)

[16] Mr. Read stated that the reason for his request was that a VECO engineer, other than the Complainant, had password protection without informing his or her supervisors. This employee then went on vacation and other workers were unable to utilize that computer. (TR 855)

Read was instructed to obtain the passwords from all of his employees because of this problem. Every one of the employees provided their passwords during his December visit down the pipeline, except for Complainant. (TR 856, 910) On December 4, 1996, however, Complainant sent a prof to Mr. Read explaining the password and lock issue, and informing him that she had received prior approval for utilizing both locks and password protection. (CX 30) Further, Complainant took exception to the series of profs in November of 1996 (CX 31), because she had installed the password on her computer and she had locked her office only with Alyeska's permission. She did not discuss these things with anyone at VECO, however, because the computer equipment was not VECO's property. (TR 257) Shortly thereafter, in Complainant's January 19, 1997 turn over notes, she supplied ATL Haines and ATL Hilgendorf with her password. (TR 784, 824)

ATL Haines testified that all of the issues pertaining to access to the computers and equipments were solved prior to a meeting held with Mr. Read and Mr. Rooney on December 10, 1996. (TR 827-28)

Minor Modification Packages

In mid-1996, Complainant began raising issues concerning her difficulties with Alyeska Engineers, involving minor modification packages and as-built maintenance. Complainant's criticisms involved two Alyeska Engineers in particular, Mr. Jost and Mr. Butter. Complainant's dispute concerned what was required to be included in minor modification packages, and whether or not they the could be moved back and forth between pump stations. According to Complainant, the Engineers were supposed to come down from P.S. 1 to sign off on the design changes, but they did not. (TR 126)

As background, minor modification packages are engineering changes to physical systems that ultimately require changes to drawings and a checklist to substantiate that quality requirements were met. (TR 1003-04) The Alyeska quality control procedures specified when and what information was required for modification packages, such as engineer drawings, environmental review, inspection certificates and the like. (TR 128-29; CX 39 at 398-410) Alyeska had developed two documents for guides for various procedures at the pump stations: EP-004, the as-built maintenance Process, and PM-2001, the Engineering Execution Manual. (APSC 4; APSC 5) Both guides, however, were ambiguous and raised numerous questions about the procedures contained in them, according the testimony of Complainant, Mr. Kinney, Mr. Read, and Ms. Johnson. (TR 1392, 1014, 779-81, 912, 1286-87) Complainant, however, had prepared a book of instructions concerning the minor modification quality requirement, with ATL Haines's approval. (TR 128, 776) Essentially, the PM-2001 provided guidelines for minor modifications, and Complainant's text was a template which organized the PM-2001 into a coherent whole, as Complainant understood it. ATL Haines subsequently held out Complainant's manual as a useful tool for engineers, but it was not required. (TR 776)[17] Alyeska employees, however, testified that Complainant felt that her manual was

[17] ATL Haines stated that Complainant had compiled an excellent tool or "go-by example" for the engineers to use in determining what should be in a package, but that the engineers had the

mandatory and necessary for assembling all minor modification packages, and she insisted that the engineers include, as a part every minor modification package, every item and procedure which she included in her manual, despite disagreement with engineers. (TR 975-77, 1008)

Complainant testified that she raised her concerns about the minor modification packages to several Alyeska Engineers, including Mr. Jost, Mr. Butter, and Mr. Kinney, as well as ATLs Haines and Hilgendorf.[18] Specifically, she reported that the engineers were not signing off on drawing as required; that engineers were stamping drawings without required professional certification; and that engineers were violating the minor modification package quality control requirements. (TR 139-40) Complainant also raised the issue with Ms. Stinson, who informed Complainant that this was not her area of expertise, and that she would have to discuss the matter with the engineers and ATL's. (TR 1174)

In addition to her co-workers, Complainant testified that she discussed the minor modification package issue with the quality engineers who traveled the pipeline, including Phil Mann, an Alyeska quality engineer in the Fall of 1996. (TR 1344) At the time, Mr. Mann was instructed by ATL Haines to evaluate the minor modification packages at P.S. 3. (TR 1345) Apparently, Complainant had developed a checkoff list to which Mr. Mann provided feed back and additions. (TR 1344) Complainant described a situation were Mr. Mann was supposed to review material, but could not find any electrical designs because they were at P.S. 4. (TR 1346) Complainant also testified that her concerns were made known to VECO's quality engineer Earl Hall regarding deficiencies with the minor modification packages issues, the fire protections issues, and the non-compliance issues. (TR 1346)[19]

Complainant testified that she would raise concerns to the engineers, ATLs, quality generalists, but "it seemed like no one was listening." (TR 1373-74) Complainant testified that she received a great deal of negative criticism for raising these concerns. Complainant testified that Mr. Butter was very angry at her for questioning the minor modification packages not being in compliance because he, as the engineer, was the ultimate subject matter expert. (TR 144) Further, he stated that Complainant's suggestions would be extremely costly in terms of manpower, resources and time.[20] In September 1996, Mr. Butter allegedly told Complainant she did not know how to read, and that

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final say.

[18] Complainant made notes regarding this problem and placed then in ATLs Hilgendorf's and Haines's cubbyhole to keep them aware of what was going on. (TR 145-46)

[19] Apparently in March of 1997, Complainant met with Ken Peacock who gave her concerns to Earl Hall.

[20] In her complaint, Complainant alleged that Alyeska Engineers "were knowingly designating 'replacement-in-kind' work instead of the much more laborious and time consuming effort it takes to design and engineer a Minor Modification Package." (CX 10)

she was not qualified to work on minor modification packages. (TR 145)[21] At one time, Mr. Butter informed Mr. Kinney that he thought Complainant might become a whistleblower, which Mr. Read took to mean that Complainant might be on "the hunt for evidence to impeach Alyeska engineering." (TR 977) Additionally, Mr. Jost and Complainant had some significant disagreements over what was required by the Quality Program.

Several Alyeska and VECO employee's testified that they did not consider Complainant's criticisms quality concerns. ATL Haines was having conversations with Mr. Pomeroy in regards to the minor modifications as they related to the quality program in 1996. Specifically, ATL Haines discussed the concerns as raised by Complainant about the fire protection systems and who must sign off on minor modification projects. (TR 779-780) ATL Haines, Mr. Read and Mr. Pomeroy, all testified that these issues were common among pump station employees. (TR 822, 912, 1274)[22]

Mr. Kinney testified concerning the minor modification conflicts concerning Complainant. Specifically, he testified that Complainant seemed to have an inability to work through disputes, and that her inability to find a middle ground seriously impacted the ability to get work done and the atmosphere at the remote pump station. (TR 975, 1015-16) In fact, Complainant acknowledged that she was in part responsible for the difficult relationships she had with co-workers at the work site. (TR 414-415) Mr. Kinney testified that "a wall went up" whenever he made an effort to talk about the subject. (TR 1016) He commented that Complainant refused to acknowledge the legitimacy of the engineers' point of view, and would not engage in a two-way conversation to try to resolve the issue through compromise. (TR 1013-16) Mr. Kinney stated that the problems between Complainant and the engineers resulted from the manner in which she chose to raise her concerns, rather than the fact that she had concerns. (TR 971-74, 1013-16) Engineers felt that they were spending an inordinate amount of time arguing with Complainant, and complained to ATL Haines that Complainant was insisting that her text be followed as mandatory. Further, the Engineers noted that Complainant was increasingly argumentative and made it difficult for them to complete their work. (TR 776, 778, 818)

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[21] Complainant told Mr. Read of Mr. Butter's comments during their January 8, 1997 meeting. (TR 1354)

[22] When asked generally about the concerns Complainant had, and whether they were quality issues, Mr. Pomeroy responded, "I took all of those issues to be more or less administrative questions about how this worked." (TR 1240) He also said that there was nothing really unusual about the questions, and that he "had the same questions from Pump Stations 1 through 4 on a regular basis." (TR 1240) As to the minor modification packages, Mr. Pomeroy stated that while the design documents, drawings and specification, together with the package itself, are quality documents, there are pieces of it that are just administrative. (TR 1258)

Ms. Haines stated that it was an "everyday occurrence" for her personnel at P.S. 3 to disagree on technical issues. (TR 822)

In an attempt to resolve some of these issues, ATL Haines and Mr. Kinney called a meeting on October 15, 1996, attended by Complainant, Mr. Butter, Mr. Jost, Mr. Kinney, and ATL Haines, to discuss the contents of minor modification packages and workflow. (TR 817) At that meeting it was determined that the engineers were ultimately responsible for minor modification packages, as specified in PM-2001, and that the engineers would determine the boundaries of the quality programs that goes into the minor modification packages. (TR 1232-33; TR 683-86, 774-78, 818) Additionally, Complainant was informed by either Mr. Butter or ATL Haines, that she was being removed from the minor modification process, and was to continue to perform only drafting work. (TR 147, 415-416)[23] Complainant admitted that she was never instructed to remain silent on quality issues, however her participation in the process was limited as far as the work she had been doing for the PM-2001 requirements, the PIP's requirements and the Quality Assurance manual. (TR 416-417, 426) At the conclusion of the meeting, Complainant was asked whether she agreed with the decision, and she responded to Mr. Kinney, "whatever." (TR 967) After she was removed from minor modification work, she continued to perform some of the drafting work. (TR 1357)

After the October 15 meeting, the workplace dynamic with Complainant changed, as did Complainant's attitude. Where she had previously been "vivacious and interactive," she had become "glum," "withdrawn" and "subdued." (TR 820, 830) ATL Haines and Complainant did not really talk after that, and Complainant stopped attending shift change meetings, as well as, DUP team meetings. (TR 820-21; 1189-90) Complainant described her working relationship with Mr. Butter, Mr. Scheele and Mr. Kinney as "edgy," and attributed this to her being too honest about quality concerns. (TR 411-13, 429-30)

ATL Haines testified that Complainant seemed unable to let go of the meeting and move on with her work. (TR 821-30) On October 16, 1996, one day after their meeting, ATL Haines noted that Complainant "could be the type that might go to the BPO if not satisfied with the process." (CX 18 at 0402; TR 795-796)[24] ATL Haines also contacted an Alyeska quality control generalist to verify that her decision at the meeting was appropriate. (TR 819-20) ATL Haines noted this attitude change when she spoke with Mr. Read and Mr. Rooney and informed them that Complainant had a "chip on her shoulder." (TR 821) Further, she noted that Complainant was not a team player, referring to Complainant's inability to work with the DUP team. (TR 821-822)

Mr. Kinney also testified as to the change in Complainant's demeanor. (TR 970) Prior to the October 15, 1996 meeting, his relationship with Complainant was very good and the two of them communicated well. Mr. Kinney approached Complainant two days after the minor modification meeting because it was clear that she was upset and he felt their relationship was "worth salvaging." (TR 1029) Complainant told him that she was not appreciated around P.S. 3, and he noticed that

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[23] According to Ms. Haines, who did not have any role in determining what went into the minor modification packages, she never changed the Complainant's assignment in regards to the minor modifications. (TR 817-18)

[24] The BPO was the predecessor to Alyeska's Employment Concerns Program.

after this meeting, Complainant would simply withdraw when there was a disagreement between her and another employee. (TR 1029-30)

Around this time, Complainant also raised several other concerns to both Alyeska employees. Specifically, she raised issues that engineers where not signing off on drawings as required. (TR 133-34), and that they were stamping drawings without the required profession certifications. Further, Complainant began raising the issue that engineers were designing and approving drawings pertaining to fire protection systems without the required NICET certification. (TR 143) Several of these concerns resulted in conflict with Engineer Scheele which occurred in February, 1997, and shall be summarized below.

Complainant Initial Contact with JPO

In November 1996, Complainant testified that she contacted Bob Jones, EEO Specialist at the Joint Pipeline Office (JPO), to raise several concerns.[25] The JPO is a combination of federal and state offices which regulates matters pertaining to the land on which the pipeline is built. The JPO enforces and implements the federal and state right of way agreements and the attendant regulations that allow for the pipeline's presence. (TR 291-92) JPO is also responsible for investigating concerns raised by employees or others about pipeline operation. (TR 292-93) Upon receipt of an employee concern in regards to the integrity, safety or environmental soundness of the pipeline, the JPO would conduct an investigation in the appropriate circumstance.

Complainant testified that she contacted JPO because she felt the DUP Team was jeopardizing audit failures of pump station personnel, she felt she was being harassed for not giving out her computer password, because Mr. Butler informed her she was unqualified to decide what should be in a minor modification package, and because Mr. Scheele raised his voice at her and told her she was doing things wrong. (TR 400-02) She also informed Mr. Jones of the non-compliance issues and how the DUP Team was not filling out the red-line logs and that Mr. Scheele was not qualified to sign off on the red line fire protection drawings. (TR 152-53) Complainant testified that her intent and hope was that Mr. Jones could facilitate her transfer to P.S. 12. (TR 152)

Subsequently, in December of 1996, Complainant telephoned Mr. Jones to inquire about the status of her complaints, and also inquiring about a transfer to a position at P.S. 12. Mr. Jones responded that he had forgotten about her request, and had taken no action. (TR 153)

December 1, 1996 Budget Meeting

On December 1, 1996, Mr. Pomeroy presided over an NBU meeting at Pump Station 2, to finalize the 1997 budget for engineering and design work in the Northern Business Unit. (TR 792-

[25] There were no entries in the Complainant's 1996 day minder regarding any meeting with the JPO, and the first entry referring to the JPO occurred on January 31, 1997. (CX 42 at JS 0045)

793, 802-803, 1241-1245)[26] Also in attendance were the Northern Business Unit Leader and the ATL's for the pump stations located in the NBU, as well as a budget analyst. (TR 1241-1242, 1249-1250)[27] Mr. Pomeroy testified that there were two main issues to be addressed by the 1997 budget: providing full, continuous drafter coverage at each of the three active pump stations in the business unit; and reducing the redline drawing backlog. (TR 1243).[28]

Mr. Pomeroy, and ATL Haines, testified that these issues had been discussed among the NBU Business Leaders, ATLs and Maintenance Advisors at regular business unit budget meetings since the summer of 1996. (TR 792-793, 1242-1243). Mr. Pomeroy testified that between mid-1996 and December 1, 1996, Alyeska explored the possibility of preparing a budget proposal which would allow for full coverage drafting positions throughout the NBU in order to deal with the backlog problem. (TR 1242) At the December 1 meeting, however, the decision was made to fund two drafting positions at each of Pump Stations 1, 3 and 4, plus two designer positions at Pump Station 1. (TR. 804, 1244-1245, 1269)[29] This resulted in a greater coverage in the NBU, but at a lower and less expense grade employee. Eight positions were affected by the December 1, 1996 decision: two designers at P.S. 1, and six designers at P.S. 1, 3 and 4.[30] The changes, as affecting Complainant, resulted in the elimination of Complainant's position, and its replacement with a lower level, and paying, drafting position.

Mr. Pomeroy testified that the budgetary pressure under which those decisions were made was significant, because Alyeska Pipeline was in the process of cutting approximately $50 million a

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[26] Mr. Pomeroy, as Maintenance Advisor for the NBU, was responsible for all NBU facility engineering work and had budget responsibility for the engineering design and drafting projects. (TR 1219-1220).

[27] The meeting was attended, and the decision made, by Mr. Pomeroy, ATLs Haines, Kriner, Veit, and Hanson. (TR 1248-50) The budget analyst had no input into the actual decisions made.

[28] At the time of this meeting, P.S. 3 and 4 each only had one drafter, staggered on opposite shifts. Alyeska had originally hoped that each drafter would be able to provide some coverage of the other's pump station, however by mid-1996 it was clear that the plan was not working, as the drafters were not traveling back and forth between stations and the stations were not receiving adequate drafter support. (TR 1241) Consequently, Alyeska was not experiencing a noticeable reduction in the redline drawing backlog. In fact, the backlog seemed to be growing in light of the routine minor modifications at each station, and the additional red-lines for incorporations generated by the DUP team. (TR 801-802, 1248)

[29] It was determined that the designer positions should be located at Pump Station 1 since that station, larger and more complicated than the others, employed full time electrical and mechanical engineers that needed the design support. (TR 1244).

[30] Mr. Pomeroy testified that this change also affected engineers, since they would have to become more involved in the minor modification process. (TR 1249)

year from its operating budget. (TR 1243-1244). All NBU designers and drafters at that time were provided on contract from VECO. Initially, in an effort to save money, Mr. Pomeroy testified that he looked into contracting the designer and drafter labor from another Alyeska contractor, Alaskan Petroleum Contractors ("APC"), which had a lower cost per hour than VECO. (TR 1244). Mr. Pomeroy's hope was that APC would be able to fill the positions less expensively and with full-time supervision in the field. (TR 1244, 1246-1247)[31] Mr. Pomeroy pursued negotiations with APC through the month of December 1996, until APC ultimately declined the invitation to supply the needed labor, because, according to Mr. Pomeroy, APC feared that they would be treading on VECO's alliance agreement with Alyeska. (TR 1236, 1246-1247) Following this denial, Mr. Pomeroy contacted VECO to staff the positions.

Both ATL Haines and Mr. Pomeroy testified that during the mid-1996 meetings, and leading to the December 1, 1996 reorganization decision, Complainant's name was not mentioned, and no consideration was given to Complainant, or to any other specific designer or drafter, in determining how to allocate the 1997 budget. (TR 805, 1250, 1268). At the hearing, Mr. Pomeroy testified that he was aware of some general issues raised in the NBU, but not specifically involving Complainant.[32] Further, Mr. Pomeroy testified that he did not provide VECO with any instructions on accomplishing

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[31] Mr. Pomeroy noted that APC offered substantial supervision of its works, as opposed to VECO who did not have full-time field supervisors. (TR 1247)

[32] For example, Mr. Pomeroy testified that he learned of a general password issue in late 1996, and he told all ATLs in the NBU that they must have all the passwords to the computer. Further, in the fall of 1996, either Paul Butter to Greg Kinney brought forward an issue concerning minor modification packages, and whether they were able to travel. (TR 1230) The situation was brought about because at the time the only electrical engineers were located at P.S. 1 and since any electrical modification had to be signed off by them, either the modification package would have to travel, or the engineer. (TR 1230-32) Mr. Pomeroy assured them that there was no problem with them traveling. (TR 1230) When asked if he was annoyed about this issue being raised, he stated: "No, I just thought it was an administrative clarification that was required." (TR 1232)

Also in 1996, Mr. Kinney approached Mr. Pomeroy with questions concerning his ability to sign on specific as-built drawings as a PE. (TR 1234) Essentially, the concern was over whether Mr. Kinney, a mechanical engineer, could sign off on a drawing that showed both mechanical, as well as electrical work, and if so, what did his signature actually mean on the drawing. He responded that while Mr. Kinney could only sign off for design work and that "[i]f [Mr. Kinney was] acting just to verify that an as-built had been completed in a area that he knew that that had actually occurred, he could sign off verifying that the as-built had been completed, where it didn't involve design work." (TR 1234-35) He said that this was a common question, and that Mr. Kinney appeared frustrated that he had to defend himself in regard to being able to sign off on drawings. (TR 1264)

Finally, Mr. Pomeroy testified that he was not aware of any of the red line, fire safety issues raised by Complainant. (TR 1233)

his general instructions, nor did he instruct them to hire or not hire any particular person. (TR 1250) The events of the rehiring for downgraded positions occurred in February through March of 1997, and shall be discussed later in this summary of evidence.

VECO Supervisors' December Tour and Interviews

In late 1996, Alyeska indicated to VECO's supervisors that it did not believe that VECO was providing close enough supervision to its employees on the pipeline. (TR 670-71) Accordingly, Mr. Read, supervisor of the designer/drafters including Complainant, and Mr. Rooney, the Field Engineering Supervisor,[33] decided to take a tour of the NBU, to speak with VECO employees and other individuals who worked alongside VECO employees. (TR 621-22)[34] Mr. Read testified that these visits were fact-finding missions to determine job duties and better understand the responsibilities of all employees. (TR 671) Further, he testified that the interviews involved similar questions of VECO employees concerning the projects they were working on, as well as any problems they were encountering. Non-VECO employees were also interviewed and asked whether or not they were receiving the services they needed from the VECO employees. (TR 672-74)

On December 10, 1996, Mr. Read and Mr. Rooney visited P.S. 3 and separately interviewed the individuals at the station, including: Betsy Haines, Greg Kinney, Paul Butter, Jerry Jost, Julie Stinson and Complainant. (CX 21; CX 60)[35] Shortly thereafter, Mr. Read also contacted ATL John Hilgendorf, Betsy Haines's alternate, who was not on duty during the visit. (APSC 33) It was through this series of interviews that Mr. Read and Mr. Rooney learned of difficulties and conflicts between Complainant and the engineers and ATLs.

Mr. Read and Mr. Rooney met with ATL Haines, who stated that her relationship with Complainant was not good, and she expressed regret at not speaking with Complainant's VECO supervisors sooner. (TR 788-89)[36] She indicated that several Alyeska engineers had complained

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[33] At all relevant times, Mr. Rooney was a the field engineering supervisor for VECO, where he supervised VECO employees working along the pipeline. Because VECO did not have any engineers in the NBU, his oversight responsibility was for designers and drafters on base-line assignment in that areas. Mr. Rooney testified, however, that he had no interaction with, or concerns about, Complainant prior to the December 1996 trip to P.S. 3. (TR 585, 616-21)

[34] Both Mr. Rooney and Mr. Read's notes of their interviews are in evidence at CX 21 and CX 60, respectively.

[35] Mr. Read and Mr. Rooney also interviewed Mr. Eric Rell and a Mr. Bower, neither of whom expressed any concerns about Complainant. (TR 622-23; CX 21)

[36] ATL Haines testified that if she had an attitude or performance issue with Complainant, it was her responsibility to work with Complainant's supervisor to resolve that issue. (TR 808) This is interesting in light of the fact that ATL Haines held the October 15 meeting with Complainant and

that Complainant was impairing and delaying their work due to her lack of cooperation on the minor modification issue. (CX 21; CX 60; TR 590, 596-97, 788-89)[37] ATL Haines, according to Mr. Rooney's notes, described Complainant as having a "chip on [her] shoulder," and that she is "not a team player." (CX 21) Further, she informed Mr. Read and Mr. Rooney about the October 15, 1996 meeting, and indicated that Complainant had become further withdrawn and would not let go of the minor modification issue. (TR 684-85, 821) She also testified, however, that Complainant did not display any confrontational or argumentative behavior after the issues were resolved at that meeting. (TR 829) She also noted that Complainant stopped attending the daily shift-change meetings. (TR 597) ATL Haines indicated that Complainant had problems working with the DUP team, and she referenced that Complainant refused to share her computer password, and would often padlock her door to prevent the DUP team from accessing the AutoCAD equipment in Complainant's office. (TR 788, 821-22)[38] ATL Haines noted that apart from her criticism of Complainant's attitude and cooperation issues, she was pleased with the Complainant's drafting and designing ability. (TR 688, 774, 793)

Mr. Read and Mr. Rooney also met with Alyeska engineer Paul Butter. Their notes reflect that Mr. Butter was of the opinion that Complainant did good work, however, he also noted that she had an attitude problem, as well as problems with cooperation and communication. (TR 593, 678-80; CX 21; CX 60) Mr. Butter noted that Complainant was not a "team player,"[39] stating that she had problems when people disagreed with her, and that she did not give any indication as to whether or not she would perform the tasks assigned. (TR 708) Further, he noted that she was unapproachable and argumentative. (CX 21) In fact, Mr. Butter described his frustration, and stated that he would

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neither Mr. Read nor Mr. Rooney was there, or even knew about it. It is also interesting that she brought these issues up at all in December because she stated that the October meeting had resolved all issue and that Complainant did not display confrontational or argumentative behavior after that. (TR 829)

[37] According to ATL Haines, the engineers believe that Complainant was "very argumentative, that she was not a team player, that she at many times was unapproachable, people were afraid to actually talk with her and engage her. They talked about their performance being lessened and impaired in having to work with her." (TR 590; CX 21)

[38] ATL Haines, however, testified that all issues pertaining to the computer password, and equipment access, in addition to minor modification packages, were resolved prior to the December 10, 1996 meeting. (TR 827-28)

[39] Mr. Read testified that he understood Mr. Butter's statement that Complainant was not a team player, to indicate that Complainant was unwilling to work as part of the group involved in the engineering process. (TR 680-81) He did not, however, ask Mr. Butter to clarify his statement. Mr. Read also testified that the phrase "team player" is not perceived in the business as a negative term, rather, he stated it merely refers to the fact that a job is required to be done by a whole team of people from start to finish. (TR 681)

avoid working with, or seeking assistance from, Complainant because he felt that he had to spend an excessive amount of time defending his decisions, and that his work was being negatively impacted. (TR 680) Mr. Rooney's notes of the interview provide that Mr. Butter also stated that he was "afraid she'll be a whistleblower." (CX 21)[40]

Mr. Read and Mr. Rooney also met with Gregory Kinney, an electrical engineer and office-mate of Complainant. At this meeting Mr. Rooney spoke first, stating that they were there to find out what was going on with Complainant and determine how to correct it. (TR 982-983) Mr. Kinney described how his previously good relationship with Complainant broke down, and he stated that she had become very difficult to work with, especially since the October 15, 1996 meeting concerning minor modification packages. (TR 591-97, 683-84; CX 21; CX 60) He also noted that Complainant was having difficulties with the DUP team and Julie Stinson. (TR 1030) Mr. Kinney noted that communication with Complainant had become extremely difficult, and that, for example, Complainant would not work with Jerry Jost, because she "disagreed with everything he said." (CX 60) Mr. Kinney felt that "we were all going to court, at some point" because of the Complainant's "intransigence" and tenaciousness. (TR 985)[41] Mr. Kinney commented that he was afraid of a lawsuit, and that she was documenting their conversations in order to use them against him in some way. (TR 978) Mr. Kinney also described Complainant as an "800-pound elephant in the living room," meaning that she could not be missed, everyone had to work around her, and she was unapproachable. (TR 595)[42] He indicated that everyone was walking on eggshells to avoid any problems with Complainant. (CX 60) Finally, during this meeting, Mr. Rooney mentioned the possibility of moving Complainant to Anchorage for closer supervision, but later informed Mr. Kinney that this would not be feasible and that he "had been directed not to do that." (TR 985, 1041-42)[43]

Mr. Read and Mr. Rooney also interviewed Jerry Jost, a VECO employee on temporary assignment at P.S. 3, who would have reported to the electrical engineer supervisor in Anchorage. Mr. Jost informed Mr. Rooney that Complainant had done a lot of good work, but that his relationship with Complainant deteriorated quickly in mid-1996. He also said that he was unable to

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[40] Mr. Rooney testified that Mr. Butter did not explain what he meant by "whistleblower." (TR 593) Mr. Butter did not testify in this proceeding.

[41] Mr. Kinney described "an increased level of militancy in" Complainant's "positions that she would take on matters such as" off-site development or content of minor modifications packages, and qualifications of engineers. (TR 1002) Mr. Kinney testified the only problem with her taking a hard position is "if the position proves out not to be correct." (TR 1003)

[42] Neither Read nor Rooney formed an opinion of what Kinney meant by those remarks, and no specifics were discussed. (TR 594-95, 682-83)

[43] This appears to contradict Mr. Read and Mr. Rooney's assertion that the December trip was merely a fact-finding mission. (TR 586, 670-71)

get work done by Complainant and that she was not completing the drawings that he needed to do to fulfill his responsibilities. (TR 597-598, 654; CX 21; CX 60)

Mr. Read and Mr. Rooney next met with Julie Stinson, the DUP team leader at P.S. 3. (TR 1182) Ms. Stinson raised the following concerns: the drawings were not hung and rolled; that the working relationship was strained; that Complainant lacked initiative; and that there were "gross discrepancies" in the red-line log book. (TR 1187) She also stated that Complainant was not attending the shift change meetings, and the excuse was that she was attending the DUP meetings, however, Ms. Stinson stated that she was not attending the DUP meetings either. (TR 1190) Generally, Ms. Stinson described the difficulties and conflicts she and the DUP team had faced with Complainant, including the padlock and password issues. She also indicated that it was easier to work around Complainant, than to work with her. (TR 1186) Finally, Mr. Read's notes of the meeting reflect that Ms. Stinson indicated to him that Complainant "misrepresents things to auditors." (TR 675; CX 60) When questioned on this statement, Ms. Stinson stated that she does not know what that was referring to. (TR 1189)

Mr. Read and Mr. George Rooney also met with Complainant to discuss, among other things, the procedures that were not being followed on the red-lining of the pump station master drawings, the lack of engineering resources previous to the arrival of the DUP Team and the password to Complainant's computer. (TR 154, 263) Complainant confirmed the statements that she was not attending the shift change meetings and stated that the reason was that she was "working with Julie Stinson's crew." (CX 60) Mr. Rooney and Mr. Read also asked Complainant if there were any issues or concerns that she had, and she responded there were not. (TR 593; CX 21) Mr. Read asked Complainant for her password, but she refused and instructed him to speak with Karen Chamberlain, as previously discussed. (CX 21; CX 60; TR 154, 598-99, 691-92)

Complainant informed Mr. Rooney and Mr. Read during this field investigation that the engineers were not signing drawings, and that she could not, therefore, complete redlines. (TR 598, 627, 707; CX 21) She did not indicate, however, any disagreement with the qualifications of the engineers, nor any disagreements concerning minor modifications. Rather, she voiced general concerns that there was a shortage of engineers which created a backlog of drawings. When asked if she had any concerns, Complainant responded "no." (TR 263-264) She explained that this was because she felt from "their track record, nothing would have happened." (TR 264) [44]

On December 10, 1996, one day after their interview, Mr. Read received a prof from Complainant, in which she referenced EP-004 and the procedure for redline, as-built process and tag renumbering. (CX 63) Mr. Read testified that he did not see this prof as a quality concern; rather, he thought that Complainant was "confused, like the rest of us were, about EP004, because anybody

[44] She could only give three examples of what the track record was that led her to believe this, and the accompanying documentary evidence revealed that Mr. Read responded or had someone respond. (TR 264-266; CX 24; CX 25; VECO 33; VECO 34; CX 26; CX 25; VECO 18)

that stated that they could understand EP004 when the writers could hardly even understand it fully." (TR 731)

On December 10, 1996, John Hilgendorf was off-site, and accordingly, Mr. Read contacted him on December 14, 1996. (APSC 33 at 8). Mr. Hilgendorf has worked, at pertinent times, as an ATL at both P.S. 4 and P.S. 3. (APSC 33 at 4-5) He was an ATL at P.S. 3 at the same time that Complainant was working there, and served as an alternate with Betsy Haines. (APSC 33 at 5) At P.S. 3, ATL Hilgendorf stated that he had very limited contact with Complainant. (APSC 33 at 7)

ATL Hilgendorf testified that Mr. Read contacted him in regard to issues concerning Complainant and her performance. (APSC 33 at 9) He stated that Complainant was technically capable of performing her duties, but had interpersonal conflicts. (APSC 33 at 10) ATL Hilgendorf testified that the P.S. communities were "very small little social microcosms that you need to really pay attention to conflict and how it's dealt with." (APSC 33 at 11) ATL Hilgendorf's concerns at the time were that Complainant was "becoming burdened with a series of conflicts that I didn't see her able to . . . deal with herself." (APSC 33 at 12) He said that while her work was good, her interpersonal problems, such as the password issue, created problems. He also noted that some engineers were complaining about difficulties dealing with Complainant, such as Paul Butter and Greg Kinney. (APSC 33 at 13-15, 20-21) He also alluded to "a little bit of cat fighting between [Complainant] and Julie Stinson." (APSC 33 at 14) Finally, ATL Hilgendorf informed Mr. Read in his interview that Alyeska would be removing the lock from the door and the passwords from the computer. (TR 696)

Mr. Rooney discussed the results of this field investigation with Mr. Read upon their return to Anchorage, the two decided there was a problem and that something had to be done, however, there were no steps taken to verify the complaints about Complainant. (TR 643)

January 8, 1997 Meeting

Following the December interviews, Mr. Read decided to hold a "performance meeting" with Complainant prior to her return to work in early January. Alyeska's role in requiring this meeting is a question of fact which has been clouded by contradictory evidence. First, Mr. Read testified that ATL Haines requested him to meet with Complainant and indicated that she would not be allowed to return to P.S. 3 without an agreement to change her behavior to be more of a "team player." (TR 705, 947-48) ATL Haines, however, denied ever making this request. (TR 822)

Second, Mr. Read indicated that ATL Hilgendorf stressed the need for VECO to counsel Complainant about her poor attitude, and he indicated that if Complainant were willing to acknowledge the problem and move forward with a better attitude, then she would be "welcomed back with open arms." (CX 60 at 25-26; TR 703-05, 948-50, 918) Mr. Hilgendorf testified that he did not ask Mr. Read to have a performance meeting with Complainant, but he understood that one was scheduled. (APSC 33 at 16-17) He does not remember instructing Mr. Read to tell Complainant not to come back to P.S. 3 unless she had a performance discussion and she agreed to change her

attitude. (APSC 33 at 19) Further, he stated that ATL Haines never said to him that Complainant should be removed if she did not change her attitude or attend a performance discussion. (APSC 33 at 20)

Testimony, however, also shows that ATL Hilgendorf informed Mr. Read that he and ATL Haines had discussed Complainant's performance issues, which they felt were more personal than professional, and felt that they had to be addressed before she returned to the worksite. (TR 701, 864, 949-50) Further, Mr. Read stated that ATL Hilgendorf told Mr. Read what to cover in this meeting with Complainant. (TR 718; CX 60 at 100025) Mr. Read testified that if the problem could not be resolved there would need to be a different person in the position at the pump station. (TR 704, 950)[45]

Regardless of this issue, in mid-December and early January, Mr. Read tried to contact Complainant to set up a meeting prior to her return to work. Soon after the December 10, 1996 interview, however, Complainant went on her Christmas vacation, traveling to Kansas to visit relatives. She was due to return to Alaska on January 4, and to work on January 7, 1997.

Beginning on December 16, 1996, Mr. Read phoned Complainant about the meeting that they must have before she returned to the worksite, and left several messages. (TR 865, CX 60) Additionally, while at her mother's house in Kansas, she received two telephone calls from VECO's personnel office and one call from Mr. Guitreau, Complainant's spousal equivalent and fellow VECO employee, requesting that she attend a meeting with Mr. Read. Complainant testified that she did not return those calls because she believed this was going to be an attempt to fire her.[46] Upon returning to Alaska, Complainant noted there were seven or eight messages on her answering machine, some of these messages were recorded by Complainant, together with her commentaries.

Mr. Read had yet to receive a returned call from Complainant, and next called three times on January 6, 1997, the day before she was scheduled to return to P.S. 3. During the third message, Mr. Read stated that he was removing her name from the charter flight roster for January 7, 1997, in order for their meeting to occur prior to her return to P.S. 3. (VECO 59a) It was afer this final message that Complainant returned his call, and scheduled a meeting for January 8, 1997.

Complainant testified that she felt the numerous messages left by Mr. Read were harassment, but also admitted that she did not return any of his messages because she was waiting to hear from Bob Jones at JPO. (TR 272-276, 279) She called Mr. Jones to request that he attend any meeting with her VECO supervisors. Eventually, Mr. Jones spoke with Complainant and stated that he felt

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[45] Mr. Read testified, "Nobody could tell me to get rid of [Complainant] because it doesn't work that way. That's a VECO issue, not an Alyeska issue. But the people and the jobs that they had, it's totally up to Alyeska." (TR 704)

[46] None of the phone calls in evidence provide any comment or suggestion of termination. (TR 868) Rather the calls request a meeting to discuss performance issues.

his presence at the meeting would possibly increase friction, and recommended that Complainant call Ms. Brenda Takes-Horse of the State of Alaska, Bureau of Land Management (BLM),[47] to attend the meeting as a witness. (CX 9; CX 58)

Eventually, the meeting was held on January 8, 1997, at 10:00 a.m, and was attended by Mr. Read, Complainant, Complainant's third-party witness Ms. Takes-Horse, and Kim Eaton from VECO's human resources department. Mr. Michael Ebersole, vice president and general manager of the Alaska operations for VECO Engineering, was briefly at the meeting to determine Ms. Takes-Horse's role, and found out that she was there merely as a witness and not in her BLM capacity. (TR 1124) Both VECO and Complainant taped the meeting.[48]

At the meeting, Mr. Read communicated to Complainant that Alyeska employees had brought concerns regarding Complainant to his attention. Mr. Read refused to provide Complainant with any names of the people who raised complaints. He stated that these concerns involved a lack of communication and confrontational atmosphere at the worksite and he instructed Complainant during the meeting to be a team player, by which he meant to work well with others, and that she should bring concerns to him for him to resolve. (TR 724-727) During this meeting, however, Mr. Read never clarified what he meant by the term, "team player." (TR 1380) Mr. Read, in addition to raising the personality concerns, informed Complainant that all locks and passwords at all pump stations were removed. (CX 9) He also informed Complainant that Mr. Pomeroy and Mr. Dwyer were drafting a letter of expectation, to clarify the roles and responsibilities of a designer/drafter, which Complainant agreed would be helpful.[49]

Complainant then began informing Mr. Read about employees who "blow off" Alyeska's quality program, about Mr. Scheele misrepresenting the status of the red-line logs and that there was a "very bad hostile situation brewing" because of her concerns. (TR 160-161) Complainant stated that she was trying to follow procedures, yet the engineers were allegedly telling her "that's a bunch of bullshit, we're not abiding by it." (VECO 60a) Complainant stated that she was being instructed to violate procedures and that she would be held accountable for quality control violations. Further,

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[47] In December 1996, Complainant completed an employee concerns opinion survey for the Bureau of Land Management. (CX 11) Its relevance to this proceeding is unclear, as Complainant did not testify that either Respondent knew of this survey.

[48] I pause to note that the VECO tape of this meeting was not presented into evidence. Apparently, soon after the January 8, 1997 meeting, VECO was unexpectedly forced to move its offices due to the discovery of asbestos. (TR 955) After moving, VECO was not able to locate its copy of the tape, along with numerous other documents. (TR 955) Additionally, Complainant's tape recording contains a majority of the meeting, but not the entire meeting. Nevertheless, the transcript of the meeting is nearly complete, plus Ms. Takes-Horse took notes (CX 59), and Kim Eaton prepared a memorandum summarizing the meeting. (CX 9)

[49] These were later commemorated in CX 20, dated February 17, 1997.

Complainant testified that she repeatedly asked Mr. Read for both the names of the people who complained, as well as the specific complainant, in order to understand what behavior need to be changed to be considered a team player, but he provided no information or explanation. (TR 159, 729, 1387; VECO 60a) She later testified that she interpreted Mr. Read's "team player" instructions as a request for her to be silent in regard to her concerns and "just do what the engineers tell me to say." (TR 1379) She, however, did not specifically ask him what he meant. (TR 1380) In all, Complainant testified that she viewed the meeting as a disciplinary action. (TR 1401)

While Complainant testified that she raised several complaints at the January meeting (TR 1398-99), there are only limited notes about the EP-004 issue in VECO's summary and Ms. Takes-Horse's notes. (CX 9; CX 58) For example, Complainant testified that she told Mr. Read and Ms. Eaton that a hostile environment was brewing at P.S. 3, (TR 160-61; CX 9) however, there is no record of her voicing hostile work environment concerns at the meeting.

Mr. Read testified that he did not view the concerns as raised by Complainant as quality concerns; rather, he saw them as further evidence of the "confrontational-type atmosphere" at the work station. (TR 722-723, 933-934)[50] He testified that it was his understanding that a designer can bring up a quality concern to an engineer, who is ultimately responsible for signing off, but that if the designer and engineer disagree, the engineer is responsible for the ultimate decision. (TR 728-729)[51] Further, he informed Complainant that any problems or concerns should be brought to him and that he would "take the heat" for it. (TR 161, 711) He explained that he wanted to remove the confrontation from Complainant and take it himself so that she could go ahead with her work. (TR 871-872)

Mr. Read testified that he recalled the January 8 meeting as constructive and upbeat, and he felt they were moving forward. (TR 871, 875) Mr. Read stated that he told Complainant that he was there for her concerns,[52] yet following the meeting, Complainant stated that she did not go to him because he had been "non-responsive" to her in the past. (TR 264-65) Complainant, despite this

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[50] Mr. Read did not initiate an inquiry into the concerns that Complainant raised because the purpose of the meeting was to resolve the attitude issue. (TR 724) Mr. Read testified that he did not view Complainant's concerns as quality concerns until she took them to the JPO. (TR 934-935)

[51] He also admitted, however, that all employees are required to hold up quality procedures. (TR 937)

[52] Despite the fact that Mr. Read told the Complainant in the January 8 meeting that he would support her 100%, he never discussed the December 11 prof with Mr. Butter and he never discussed the computer issue with Ms. Stinson. (TR 733) Mr. Read clarified that his commitment in the January 8 meeting was from that day forward.

statement, did contact Mr. Read in late January and February concerning a few issues, which were addressed by Mr. Read.[53]

Red-line Issues and Fire Protection

In November of 1996 through March of 1997, Complainant voiced criticism of how some of the DUP team designers and engineers completed the red-line log forms.[54] Specifically, Complainant challenged the method employed by Mr. Kevin Scheele, a VECO electrical engineer assigned to the

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[53] After the January 8 meeting, Complainant sent Mr. Read profs concerning pay for the time she had missed work because of that meeting. (VECO 33) There were not, however, any quality concerns raised in the correspondence. The meeting was charged to the Design Support P.S. 3 project number. (VECO 34)

On January 11, 1997, Complainant sent a prof to Mr. Read concerning "Rumor Control," requesting his help in finding out the source of a rumor. (CX 62) On January 20, 1997, Mr. Read responded to Complainant's concern, and also explained why his message was briefly delayed. (VECO 61; TR 876-77)

Next, on January 30, 1997, Complainant sent a prof to Mr. Read, requesting that he "help in resolving an outstanding issue regarding the performance discussion" of January 8, 1997. (CX 25) Essentially, Complainant was requesting the names and specific complaints lodged against her, "and causing . . . unmitigated harassment towards myself." Complainant provided Mr. Read forty-eight hours to respond, before she would "be forced to go outside the company and request a full scale investigation to be launched concerning this incident." (CX 25) Mr. Read responded on January 31, 1997, refusing to divulge names, citing the company's policy of keeping complaints confidential in order to protect any individual acting as a whistleblower. (CX 24)

Finally, on February 4, 1997, Complainant sent a prof to Mr. Read which stated: "Steve, it is truly unfortunate that you have chosen not to cooperate in resolving the hostile work environment that has evolved . . ." (CX 26) Mr. Read referred this complainant to the human resources departments. On February 11, 1997, Kimberly Eaton, of VECO human resources, e-mailed Complainant and stated, "I am concerned about the hostile work environment that you referred to in your note to Steve Read. If you could provide me with more information I will look into the situation for you." (VECO 18) Complainant acknowledged at the hearing that she never responded, stating that she "spelled it out clearly" at the January 8, 1997 meeting. (TR 323)

[54] A redline log serves to track the status of drawings through the as-builting process. This includes the many drafting stages up through its approval by an engineer and its reincorporation into the master set of station drawings. (TR 1079-1080) The log form is comprised of a number of columns consisting of various fields in which can be entered drawing numbers, dates for review and approval of those drawings, and the name of the persons who have reviewed and or approved the redline changes to the drawings. (CX 35)

DUP in September 1996. Mr. Scheele's responsibilities involved reviewing the red-line work and approving it for drafting. (TR 1072)[55]

Complainant's criticisms included her belief that too many drawings were being listed on a single line and that Mr. Scheele was using the wrong column for the approval date and his signature. (TR 150-151, 1080-1081) Thus, Complainant's concern was that incomplete drawings could be erroneously viewed as finished. Alyeska's As-Built Maintenance Process, EP-004, does not state that Mr. Scheele cannot sign off, yet it says that he must follow local methodology, and Mr. Scheele testified that he did not follow local methodology. (TR 1413-15; APSC 4 at 1567) He explained, however, that he believed that his method of completing the red-line log was in compliance with EP-004, although it did not conform to "that tracking device." (TR 1101-05) Mr. Scheele admitted that he modified the red-line log book to "suit his purposes," but stated that it was his judgment that the volume of drawings being reviewed by the DUP team necessitated a different approach. (TR 1078-1085) For example, he felt that it was neither feasible to limit the form to one drawing per line as Complainant preferred, nor to register his approval in a single space at the bottom of the form. Mr. Scheele stated that his review of the many drawings on each sheet often took several days and his signature would have invited the erroneous impression that all drawings had been approved before he had finished. (Tr. 1081-1082) Instead, he registered his approval line-by-line. (Tr. 1082-1084) Complainant, however, felt this was against procedure and was dangerous to quality concerns, because they appeared finished when they actually required more work.[56]

Some of Complainant's specific complaints concerned the pump stations fire protection systems. Mr. Scheele testified that he noticed that Complainant had affixed a note stating that the wire splices, which were in some of the initial circuitry of the fire alarm system, were not allowed, and that the system need to be written up in an Non-Conformance Report (NCR). (TR 169, 1091-92) Mr. Scheele testified that he then left a note for Complainant asking, "By whom?," by which he sought to have Complainant prove the authority on which she based her opinion that wire splices were not permitted. Complainant's response to this note was recorded in her Day Minder, "Kevin left a note that I had written about a splice in an initiating device that should have an NCR written on it. His note said 'By Whom'. Duh. I hope it is not my responsibility to educate these people on the designs of fire systems." (CX 42 at 52) The testimony of Mr. Gary Smith, of Alyeska ECP, stated that Mr. Scheele interpretation was correct, and that splices were permitted in fire alarm systems (TR 513)

This conflict came to a head in early 1997, when Complainant's concerns were brought to Mr. Scheele's attention. On February 11, 1997, Mr. Scheele had a conversation with Complainant right

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[55] Mr. Scheele has engineer-in-training and professional engineer experience with fire protection systems, and also underwent Alyeska training on PM 2001 and the PIP's, although not on EP-004.

[56] In fact, in April 1998, Mr. Scheele was requested to return to P.S. 3 and re-do the red-line logs. (TR 1107)

before she was to go off-site. (TR 1078-83) Mr. Scheele raised an issue that a number of drawings that he had signed, indicating that they were ready for the redlines to be incorporated into the master drawing, had not been finished.[57] Complainant responded that she had not completed the drawings because she felt that Mr. Scheele had improperly used the redline log in signing out the drawings. (TR 1078-83)[58] Complainant's refusal resulted in holding up the drafting on approximately 150 drawings. (TR 1084-92) Mr. Scheele stated that while Complainant was refusing to incorporate red-lines based on her adherence to EP-004, he also noted that she had allowed the drawings to be checked out for over 200 days, in violation of EP-004, which limits the check out times to one person to 90 days. (TR 1084-85)

Following the conversation, Mr. Scheele described this conflict in a prof to Julie Stinson, on February 12, 1997. Ms. Stinson forwarded the message to Mr. Kinney, who then forwarded it to Mr. Read and Mr. Rooney. (CX 23) Specifically, he stated: "My concern is that, based on her refusal to recognise [sic] the engineer's approval authority and her apparent need to check the engineer's work, her cooperation will not be forthcoming soon." Further, he states that he has heard from third-party sources that Complainant questioned his qualifications regarding fire protection systems, but that she has yet to raises those concerns to the DUP team. (CX 23) Additionally, Mr. Scheele found Complainant's remarks on the red-line drawings to be sarcastic. (TR 1088)[59]

Complainant testified that she did not tell anyone, other that Mr. Scheele, that she was not going forward with drafting on the at issue drawings because Mr. Scheele did not properly sign off. (TR 1396) Nevertheless, Complainant testified that she reported her general concern to Mr. Kinney and to Mr. Read in the January 8th meeting. (TR 151)[60] Further, Mr. Pomeroy testified that in late 1996 or early 1997, he became aware that Complainant had raised concerns about the engineering

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[57] Several month prior, Darrel Krolick, the lead drafting designer of the DUP team, had obtained a verbal commitment from Complainant that she would work on those drawings. (TR 1076-84)

[58] Instead of completing the drafting at issue, Complainant has been rechecking and modifying DUP team work on drawings that had previously been finalized and reissued. (TR 1088-89) Mr. Scheele testified that Complainant had annotated the completed drawings with remarks, which, according to Mr. Scheele were sarcastic and unprofessional. (CX 23; TR 1076-84, 1096)

[59] Mr. Scheele was not able to give a specific example and his general recollection was very vague and, to me, not plain in its sarcasm. (TR 1096) Mr. Scheele also admitted that he has been sarcastic to Complainant. (TR 1097)

[60] Mr. Read testified that, upon receipt of a February 12, 1997 prof from Mr. Scheele (CX 23), he perceived personal conflict between Mr. Scheele and Complainant rather than quality concerns. (TR 669-70) Mr. Read testified that Complainant never raised this, or any other quality concerns to his attention.

signatures required on a red-line. (TR 1238) Ms. Stinson of DUP was also aware of this issue.[61] Further, Ms. Stinson had a conversation with Mr. Kinney concerning the way Complainant interpreted the Quality Control Program to her benefit and not to the benefit of the project or the company and impeding the progress of the program. (TR 1198) Complainant continued to voice this concern, up and until her termination. In her March 10, 1997 change out notes, she again reiterated that the red-line logs were not in compliance with the requirements of the quality control program. Complainant noted that the logs are filled out and appear as if the drafting is completed, when really they needed further work and approval. She commented that an auditor could view this as a falsification of records. Further, she wrote: "IT WON'T MATTER WHO TAKES OVER AFTER I LEAVE, THE PROBLEM STILL REMAINS THAT THE CHRONOLOGICAL VERIFICATION PROCESS OF THE REDLINING ACTIVITY *IS STILL NOT IN COMPLIANCE* AND CAN NOT BE TRACKED ACCORDINGLY." (CX 19)

Complainant Contacts Outside Agencies

Complainant testified that she continued to contact the JPO officials regarding P.S. 3 and the failure to comply with quality procedures after the January performance meeting. (TR 166-67)[62] She testified that she advised the JPO officials that Mr. Scheele was performing design work without the required qualifications, and that he was not properly completing the red line logs. (TR 169, 1079; CX 35)[63] Further, Complainant testified that she raised these concerns to JPO because the pump stations are located in remote areas and noted that it is "imperative" that fire protection is functioning properly. (TR 1377) In March, Mr. Jones contacted Complainant and asked her to speak with Mr. Joe Corea, the JPO's quality assurance person, to whom Complainant explained her concerns shortly thereafter. Mr. Corea and Mr. Jones asked Complainant to participate in an investigation.

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[61] There was some meeting between Ms. Stinson and Complainant were Ms. Stinson asked Complainant if she would be interested in training on the EP004 in the NBU, in order to get her more involved with the DUP team. Complainant responded, "No, they won't let me do it." (TR 1178) She did not specify who "they" were, although Ms. Stinson guessed that it was the ATLs or the managers to which Complainant was referring. (TR 1177-78)

[62] The first notation in the day minder that refers to the JPO is on January 31, 1997, when Complainant noted that a cheaper draft type for her position was requested by Haines and Pomeroy. (TR 361; CX 42 at JS 0045) Complainant wrote "I need to find out if the JPO is aware of this." (TR 359) The first reference to the JPO is on February 5, where she noted "Talked to Ray Elivan/JPO about my concerns with NICET cert., tags [numbers], discrimination, VECO, As-builts, [drawing] files, passwords, etc." (TR 361; CX 42 at JP 0046) Complainant's entry of Feb. 13 refers to her gender harassment claim. (TR 371-372) The first documented meeting with Bob Jones of the JPO is on February 20, (TR 385; CX 42, JS 0051) although Complainant testified she had met with him prior to that. (TR 385)

[63] Complainant provided JPO with a tabulation of the red-line log sheets that were not in compliance. (TR 181; CX 35)

Additionally, in mid-February, the Bureau of Land Management came down the pipeline and wanted to talk about the survey she had compiled on December 14, 1996. (TR 166; CX 11) Complainant informed them more fully of some of the concerns that she had raised, such as the minor mods, non-compliance with the fire codes, and non-compliance with Alyeska's quality assurance procedures. There is no evidence that Respondents knew of this meeting or Complainant's completion of the survey.

Complainant also brought concerns to Alyeska's Employee Concerns Program (ECP). In 1996, Complainant raised a claim based on gender discrimination and that VECO's policies produced a chilling environment for employees to raise concerns. Further, Complainant filed a claim in late 1997, based on many of the issues before this Court. That investigation, however, falls outside the relevant time period in this case, with the exception of a few items which will be alluded to later in this Recommended Decision and Order.

Down-Graded Position and Lay Off

As noted earlier, when APC declined Alyeska's invitation to supply labor needs for the downgraded positions, Alyeska turned to VECO. On February 14, 1997, Mr. Pomeroy and Joe Dwyer sent a prof to George Rooney at VECO and told him that the NBU had decided to increase the number of drafting positions, while bringing the price for those positions down to around $45 per hour. (CX 48; TR 629-30, 1248) Mr. Pomeroy's message indicated that Alyeska hoped that the personnel changes could be in place by mid-March, 1997. (CX 48; TR 629) Mr. Rooney immediately forwarded this prof to Mr. Read. (TR 878) Mr. Rooney indicated that VECO could supply the labor needed at what VECO called the "Senior Drafter" level. (TR 1248). Specifically, Mr. Pomeroy was requesting that VECO provide the following: six senior drafters to provide as-builting services at P.S. 1, 3, and 4, and two senior level designers at P.S. 1. (TR 629-30) As a result, the senior designer positions at the pump stations were to be downgraded to senior drafter position.

Mr. Rooney testified that VECO was not interested in transferring incumbent employees directly into "new" positions because they involved a demotion in position level and pay. (TR 633) Accordingly, Mr. Ebersole directed Mr. Read to post the down-graded position openings to allow for applications by interested parties. (TR 879, 1125)

Complainant was on R&R when the notice was received from Alyeska. Nevertheless, on February 17, 1997, she was contracted by a co-worker, Earl Hall, who told Complainant that "Steve [Read] said that it's out of his hands but any people displaced in the field will be reassigned to the office." (CX 42) Complainant knew, as of February 20, 1997, that her position was being changed to a drafter position and noted it in her day minder. (TR 385-386)[64] Mr. Read attempted to contact her concerning the changes on February 26, 1997 and March 3, 1997. (CX 60 at 100042) Mr. Read informed Complainant that she would have to apply for the downgraded position, however, she had

[64] Also, on February 21, 1997, Ron Guitreau telephoned Complainant and told her that the position was being downgraded. (TR 386)

already done so on February 26, 1997. (TR 179; CX 42 at JS 0052) Complainant applied for the senior drafter position at P.S. 3 and designer position at P.S. 1 which were listed in vacancy announcement dated March 13, 1997. (TR 223) They had not been filled as of that date to Complainant's knowledge. (TR 223)

Complainant, upon learning of the reorganization plan, also contacted Mr. Jones at JPO alleging that the reorganization was the result of a "conspiracy to get rid of [her]." (TR 167) On March 20, 1997, Complainant met with Colleen McCarthy and James Lusher, who were two engineers assigned by Jones to investigate Complainant's concerns. (TR 167) Complainant then agreed to waive confidentially with the JPO and participate in an investigation by JPO officials at P.S. 3. (TR 167-68, 297) On March 24, 1997, Complainant received a call from Ms. McCarthy and was told that the JPO investigative team was scheduled to meet with Complainant at P.S. 3 on March 26, 1997. (TR 182, 392)

VECO received and evaluated several applicants, including Complainant who submitted an application for the drafter position at P.S. 3, and the designer position at P.S. 1. (TR 178, 223, 739) The hiring committee for downgraded positions consisted of Steve Read, George Rooney, Amanda Otto,[65] and Rob Shipley.[66] Mr. Rooney testified that the general qualifications considered were: total experience, Alyeska experience, experience with AutoCAD, Word and Excel, field experience, and other general comments. (TR 606-07) The committee prepared a chart specifying the comparative qualifications of all candidates. (TR 736-46, CX 15) Mr. Read also participated in creating the matrix, which was compiled by reviewing the applicants' resume. (TR 736)

Shortly after receiving the call from Ms. McCarthy on March 24, 1997, Complainant received a call from Mr. Read informing her that she was not selected for the drafter position. (TR 399) According to the testimony of Mr. Rooney, Mr. Read, and Complainant, they all agreed that she was technically qualified for both positions. (TR 736-39, 959-60, 132-33) At the time, Mr. Read would not tell Complainant who had been selected to the downgraded position at P.S. 3, 1 or 4 or who made the selection.[67]

Despite her qualifications, both Mr. Read and Mr. Rooney testified that Complainant was not selected because of the problems Complainant had in working with others at the pump station. The "comments" section concerning Complainant in the decision maker's notes stated, "At P.S.#3 as designer/tech. Skills good/poor rapport w/ client and ? Team support." (CX 15) Further, Mr. Read testified that he had concerns that Complainant would not be satisfied with the down-graded position

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[65] Ms. Otto was from VECO's Human Resources Department.

[66] Rob Shipley was Mr. Read's supervisor. (TR 609, 745)

[67] Complainant subsequently learned who had been selected to the position at P.S. 3 and that person is less qualified than Complainant in terms of years of experience and familiarity with the facility and the individuals who work there. (TR 133)

to Senior Drafter, because she was previously dissatisfied with her promotion to Senior Designer.[68] Mr. Read also cited a number of other reasons for Complainant's non-selection, including: her problems with her time sheet, her refusal to work on her time off, and problems scheduling her training. (TR 742)[69] She was also not selected because of the poor relationship with the client, and Mr. Read testified that he did not think it was in VECO's best interest to have her in the field unsupervised. (TR 739) Mr. Read testified that he thought Complainant would be more successful in a position in town where she could receive closer supervision. (TR 739-41) Finally, he stated that no one at Alyeska instructed him in any way as to how to go about making the selections. (TR 929-930)

A question exists as to the time of these decisions. Mr. Read and Mr. Rooney testified that the decisions were made on the same day in late February or early March, but that the successful applicants did not start at the same time due to a scheduling issues. (TR 930-31) The down-graded positions, however, continued to be posted on the Position Announcements. The positions were also listed as vacancy announcements in the April 2 and 10, 1997 listings, although Complainant had been told on March 24, 1997 that she had not been selected. (TR 223-225) Mr. Read explained that the downgraded positions were still being posted after he informed the Complainant that she was not selected to the any of the positions because the postings were handled by the Bellingham office and that office must have made a clerical error. (TR 885-886) Apparently, VECO employee Brenda DeVries would have contacted Bellingham and instructed them to stop the posting once the position was filled, however, Ms. DeVries did not testify in this matter.

There were several other issues and confusion as to the when the selection was completed. On March 20, 1997, ATL Haines noted a conversation with Mr. Pomeroy that no drafter had been selected as of that date. (TR 794-95; CX 18 at APSC 0409) Mr. Read testified that the hiring chart dates suggest that the decision was made sometime after March 17, 1997. (TR 746-47; CX 15) Mr. Ebersole testified that someone at VECO knows the day the hiring selections were made for the downgraded positions (TR 1146), however, in response to interrogatories, VECO claimed that there was no record of when the decision was made. (ALJ EX 100) Mr. Pomeroy testified that he found nothing strange about the timing, and said that some vacancies were open while waiting for the new-hire "to get free and get put in that position." (TR 1251) He also commented that he heard that the positions were filled, and received names, but at different times. (TR 1253) Finally, in a March 11, 1997 change out note to Mr. Pomeroy, Complainant left specific instructions for the people who

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[68] Mr. Read admitted, however, that Complainant probably knew when she applied for the position that it would be at a lesser pay rate. (TR 740)

[69] Nevertheless, the time sheet and training issues were resolved by July 8, 1996, when Complainant was promoted. (TR 743-44) Further, in her performance evaluation, Mr. Read described Complainant as consistently on time with her time sheets and current in her training. (TR 743-44, CX 22) Further, Complainant had previously volunteered to work on her R&R, and later changed her mind. Complainant was not required to work on her weeks off.

"are" replacing her, (EX 37) although she continued to assert that she did not know as of March 11 that she was being replaced. (TR 423-424)

Regardless of the timing questions, it is clear that on March 24, 1997, Mr. Read telephoned Complainant and told her she was laid-off. (TR 182-183; 329)[70] Mr. Read testified that when he called Complainant to inform her that she was not selected for the two positions for which she applied, he also offered her a Senior Designer position in Anchorage, but she turned it down because it was not a 2/2 rotation, and believed that it might have been during that telephone conversation. (TR 751-752, 664, 880) Mr. Read testified that he offered her this job, despite his "team player" and supervisory concerns, because she would be under Mr. Read's direct supervision in that office. Further, he said that it was because she refused the Anchorage offer, and that VECO did not have any other openings, that Complainant was laid off. (TR 880-81)

Evidence of any Anchorage offer, beyond Mr. Read's testimony, is scant, and Complainant denies that any offer was made.[71] Mr. Read claimed that he informed his supervisor, Mr. Shipley, about the Anchorage offer and rejection, however, Mr. Shipley was not called to testify in this matter. Mr. Ebersole also testified that he was aware that Complainant was offered a position in Anchorage, but declined to accept it. (TR 1126) However, in his deposition testimony he stated that he did not know if she was offered another position. (VECO 87 at 75) At the hearing, Mr. Ebersole somewhat clarified this ambiguity by stating that he was not certain if he saw a document or spoke with someone concerning an offer to Complainant, but "[i]t was [his] understanding that she was" offered a position in Anchorage. (TR 1146) Mr. Ebersole stated that had Complainant accepted the Anchorage position, she would not have been laid off. (TR 1148)

Complainant, however, testified that she was never offered a position in Anchorage, and that if it had been offered, she would have accepted it. (TR 330, 1374) Further, on May 2, 1997, VECO's Human Resources Department responded to an inquiry by the Alyeska Employee Concerns Program, concerning claims of retaliation, and in VECO's response, there was no indication of any Anchorage job offer. (CX 77) Rather, the report stated: "She was not selected, due to her lack of demonstrated teamwork skills, and was permanently laid-off with an adjusted effective termination date of April 8, 1997." (CX 77) Finally, a June 30, 1997 memorandum from Ms. Otto in VECO's Human Resources Department stated that Complainant was laid off for a lack of work. (CX 3)

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[70] Complainant was the only employee selected to be laid off as a result of the downgrade decisions. (TR 132)

[71] It is interesting to note that although Mr. Read testified that he was instructed by VECO's Human Resources Department to take notes of his conversations and actions with regard to Complainant, he did not take a note that he offered her the Anchorage position. (TR 946-47) He explained that he kept notes in many different notebooks, generally, grabbing that which was closest, and that some of his notes were lost in an office move. (TR 947, 954-55)

The only evidence that Complainant was aware of the possibility of an Anchorage position is found in her day planner for February 17, 1997, where she conveyed her understanding that "any people displaced in field will be reassigned to the office." (CX 42 at JS 0050)[72] Complainant, however, testified that she never inquired about in-town positions from that date to the date of her termination. (TR 330-32, 1383)

JPO On-Site Investigation

After Complainant's termination, an issue immediately arose concerning the JPO on-site investigation. As previously noted, the JPO had planned an on-site investigation commencing on March 26, 1997. On Tuesday, March 25, Complainant called Rod Ustanic at the EEOC and said she had been laid-off because of her EEOC complaint against VECO. On March 26, she called Bob Jones and said she had been laid-off because she was a whistleblower, and that she could not participate in the investigation because she had been laid-off. (TR 399-400)

Mr. Jones testified that he then contacted both Harry Kieling, the manager of the Alyeska Employee Concerns Program (ECP), and Ted Owens, manager of the Alyeska Business Practices Office to inform them about JPO's planned on-site investigation. (TR 297-98) Mr. Jones requested that Alyeska ask VECO to allow Complainant to remain employed at P.S. 3 while the investigation was conducted. (TR 297-98) Harry Kieling then contacted Mike Ebersole, the Vice President and General Manager of VECO's Alaska Operations, and told him about JPO's investigation and extension request. (TR 1127) Mr. Ebersole assured Mr. Kieling that Complainant would be reinstated in order for the investigation to be conducted. (TR 1128)[73]

Upon learning of the impending on-site visit, Mr. Ebersole contacted Mr. Read, who in turn contacted Complainant, but she would not speak with him.[74] Mr. Ebersole then sent Complainant a letter offering continued employment for one week in order to accommodate the scheduled meeting with JPO. (CX 12) Mr. Ebersole stated that the offer of extended employment would last the length of the JPO meeting, and that Complainant would receive 84 hours of severance pay, including 40 hours of regular pay, and 44 hours of overtime. (CX 2; TR 1129)[75] This apparently comprised one

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[72] She said she learned that this is what Mr. Read told Greg Combs, who told Earl Hall, who told her. (TR 1383)

[73] Mr. Ebersole testified that he "also mentioned to him that it would be awful helpful to our organization if they would notify us of these sort of things that were going on, so we'd be aware of what was transpiring with our employees." (TR 1128)

[74] Complainant read a response to Mr. Read instructing him not to call her again, but to contact her lawyer. (TR 883, CX 60)

[75] On March 31, 1997, Kim Eaton of VECO sent Complainant a check based on this amount. (CX 29) Complainant worked for MAC from April 22, 1997 through May 6, 1997.

additional week of work with JPO investigation, and a reduction of the originally offered severance pay.

On March 31, 1997, Complainant sent a letter to Mr. Ebersole rejecting his offer, and requested 88 hours of straight time and 86 hours of overtime. (CX 16; TR 1129) Complainant, however, agreed to work through the investigation with Management Analysis Consultants (MAC), another Alyeska contractor. (TR 184-85) Subsequently, on April 7, 1997, VECO sent Complainant a second letter agreeing to the terms in Complainant's March 31, 1997 letter. (CX 65) Thus, Complainant returned to work at P.S. 3, and JPO investigators Colleen McCarthy and James Lesher, conducted an onsite review of the records at P.S., together with Donald Hall[76] and Complainant. (TR 185-86, 317; CX 40)[77]

Complainant did not inform Mr. Read that she had filed a JPO complaint or that there was a pending investigation. Further, Mr. Ebersole, Mr. Read and Mr. Rooney all testified that they did not learn of the JPO-planned investigation until one day following Complainant's lay off. (TR 1126-28, 634, 882-83) Complainant also testified that she did not inform Mr. Read about the JPO complaint or pending investigation at P.S. 3. (TR 332) In fact, Bob Jones of JPO testified that while JPO usually informed Alyeska and contract before conducting an inquiry (TR 558), that he never spoke with Mike Ebersole, or anyone one else at VECO concerning Complainant's complaint, prior to her lay off. (TR 299) Further, Pat Higgins from Alyeska's ECP testified that he did not speak with anyone at VECO about Complainant's concerns. (TR 577)

Opinions of Complainant's Lay Off

This record contains a great deal of testimony from individuals expressing their views, and the views of the Respondents, concerning the reorganization, non-selection, and lay off process.

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[76] Mr. Donald Hall, at the time was employed as a quality engineer by VECO. During the first six months of 1997, Mr. Hall intermittently visited P.S. 3 as part of the DUP program. Mr. Hall first met Complainant in March 1996, when he was working for the JPO and helping assess Alyeska's implementation of the Quality Program, and he interacted with Complainant on a weekly basis throughout 1997. He described her as a team player who was professional, conscientious and knowledgeable. (TR 310-311) Mr. Hall was aware of Complainant's concerns regarding maintenance of and entries into the red-line logs, fire protection drawings, qualifications of engineers, and minor mods. Mr. Hall contacted Mr. Read when he heard about the impending downgrading of positions and, when he brought up Complainant's name, Mr Read said he would need his lawyer present if Complainant was going to be discussed. (TR 312)

[77] The investigation results, while not necessarily persuasive evidence in this matter, did substantiated many of Complainant's complaints concerning quality control issues. The findings were issued to Alyeska on May 29, 1997. (TR 37, CX 40)

Mr. Pomeroy and ATL Haines both testified that at no time did they, or any other Alyeska employee suggest how VECO should go about filling the down-graded positions or indicate which specific persons should be hired, and that no one from Alyeska was consulted about either the process or the selection. (TR 806, 1250) This was also supported by the testimony of Mr. Read and Mr. Rooney. (TR 639-40; 929-30)[78]

Mr. Read testified that the procedure involving Complainant was different from the usual lay-off procedure outlined by VECO (CX 87), because that procedure deals with the situation where many employees in one work group are to be laid off at that same time and the supervisors must determine the time and order or the lay off. (TR 881-82) Mr. Read testified that the procedure was not followed because the goal of the reorganization was not to lay-off any employees, but to offer positions in town for anyone displaced. (TR 881) Mr. Read also reiterated that at the time he felt that all of Complainant's concerns dealt merely with administrative issues, and not quality concerns. (TR 953-54)

Mr. Kinney testified that he spoke with Mr. Pomeroy about the downgraded positions and he was told about two of the positions targeted, which were the positions held by Complainant and Ron Guitreau, her spousal equivalent. (TR 988-89) Mr. Pomeroy informed Mr. Kinney that the positions were being downgraded because of the NBU maintenance advisors engineering budget and because of the massive backlog of drawings, and he indicated that Complainant's position would be affected. Mr. Kinney testified that he was uncomfortable with that decision because he believed the expertise of a designer would be needed because of the ongoing need for design work. (TR 990) Mr. Kinney did not, however, want Complainant to remain as the designer at P.S. 3 because after the October 15, 1996 meeting the communication by Complainant had degenerated and there was no movement on her side to resolve the problems. (TR 991)

Mr. Ebersole testified that he was only made aware that Complainant was not selected when he was asked to sign her termination slip. He stated that at that time, he was only aware that Complainant had filed a complaint regarding her salary and gender discrimination with the ECP. (TR 1128-29) Mr. Ebersole was not aware that Complainant had raised any technical issues, nor was he aware that she had contacted JPO. (TR 1126-28) In fact, he testified that he first learned of the JPO complaint when he was contacted by Mr. Keiling, one day following Complainant's termination. (TR 1127) Finally, he stated that they did not follow the general layoff format because they did not anticipate that anyone would be laid off, since VECO "felt that [it] had enough opportunities in the organization that [it] would not be laying off any of the individuals." (TR 1149)

Ms. Stinson was asked about the reorganization at the hearing, and she testified that she did not have any input into the decision. She stated that she never attempted to have Complainant

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[78] According to Mr. Read, VECO had the responsibility of determining Complainant's wage rates, performance evaluations, discipline, and discharge. (TR 915-916) Nevertheless, Mr. Read and Mr. Rooney based their decision on their December meeting where they received criticism from several Alyeska employees. (TR 609, 739, 766-67)

removed from the station. (TR 1194) Further, she had never heard Betsy Haines, John Hilgendorf, Glen Pomeroy or Joe Dwyer make comments about wanting to remove Complainant. (TR 1194-95)

Complainant also testified to her experience and thoughts about the events that transpired in late 1996 through March 1997. She testified that she felt the reorganization, and reduction of her position from Senior Designer to Senior Drafter, was discriminatory and directed at her. (TR 1347) She also alleged other evidence of discrimination, such as: when Paul Butter stated to Kevin Scheele that Complainant had a mental problem. (TR 1356) Regarding the comments that she is not a "team player" Complainant testified that she understood that to mean that she should stop raising safety concerns and just follow the orders of the engineers. (TR 1371)

Job Search

After being laid-off, Complainant attempted to find employment through the want ads and word of mouth. (TR 189-96) She submitted applications to listings she found through the want ads and she had one interview, but declined because she would have had to move. She also continued to try and obtain employment with VECO. (CX 1)

On June 18, 1997, Complainant sent a letter to Brenda DeVries requesting that VECO "accept and process my resume for job positions available that are of equal character & nature to the position I was laid off from in March of '97." (CX 1) On June 19, 1997, Amanda Otto responded by forwarding to Complainant a listing of the current job postings.[79] Ms. Otto instructed Complainant to indicate which positions, if any, she was interested in applying for. (VECO 8)

On June 27, Complainant sent another letter to Ms. Otto, informing her that the job posting did not contain any positions in which that she was interested. (CX 2) Complainant also wrote that she wanted to be considered for positions that had not been posted and requested VECO's "re-hire" policy. Specifically, she wrote:

> I have reviewed the VECO job position list and I have found no positions listed that are equal in nature and characteristics as the position I was laid off from in March of '97. The following are a few of those requirements:
>
> - employment based out of Anchorage Alaska
> - air and ground transportation provided to & from my assigned work site
> - 12 hour days
> - two week on/two week off rotation
> - food and housing provided for the weeks on shift

[79] When Complainant was laid off, she received one position announcements list, but all of the positions were in Fairbanks and would have required Complainant to relocate from Anchorage to Fairbanks. (TR 191)

- $27.93 per hour in straight time wages plus time and a half for overtime
- permanent employee status with all benefits associated with permanent employment
- continuation of my seniority within the company

. . . Please continue to consider my resume for positions that my open up in the future that are equal in nature to the job I had held at Pump Station #3.

(CX 2)

On June 30, 1997, Ms. Otto responded that VECO did not have a re-hire policy. (CX 3) The letter also indicated that all positions are posted whenever possible. (CX 3; TR 192) Further, Ms. Otto noted that Complainant's "requirements" would seriously impact her ability to be rehired. Nevertheless, Ms. Otto stated that there was a position posted in VECO's June 27 position announcement that may fit Complainant's requirements and stated that her resume had been forward to the hiring supervisor. (CX 3) Generally, however, Ms. Otto stated, "It is not our practice to commit to an individual, current employee or otherwise, that we will submit their resume for every position that they might be interested in. . . . While we know you are still interested in resuming your employment relationship with VECO Engineering we will continue to consider your resume only for those positions in which you specifically indicate an interest." (CX 3)

On July 10, 1997, Complainant responded to Ms. Otto's letter and noted that her "requirements" were negotiable. She also stated: "What I was looking for was a field rotation position and I realize that for me, there are not many opportunities within VECO. Therefore, I am willing to accept a lesser salary than was stated in my June 27, 1997 letter." (CX 5) At the hearing, Complainant also noted that she was looking for a pump station position, and did not indicate to VECO that she was available in other available positions. (TR 340, 1417) Further, Complainant informed Ms. Otto that she wanted to be considered for any positions that were not being posted. (TR 196; CX 5) Ms. Otto responded that in order to be considered for a position, the applicant had to identify the specific recruitment number. If a job was not posted, however, there was no specific recruitment number. (TR 196-197)

Mr. Read testified that during this time, from March to August 1997, he would not have considered Complainant for any remote pump station position she applied for with VECO, because he felt that she needed to be more closely supervised. (TR 765-77)

Complainant compiled a list of positions for which she applied after being laid-off. (VECO 51) Additionally, Complainant, in her second complaint, alleged that she was not selected for thirty-five (35) positions, based on VECO's position announcements from March 24 through August for principal designers, senior designer and designer positions. Respondents, however, point out that Complainant had only applied for two positions with VECO, despite being instructed by Ms. Otto, that Complainant should apply to individualized postings of interest.

On August 20, 1997, Complainant again sought information regarding another position at P.S. 5. (TR 216)[80] There was a P.S. 5 position for a mechanical designer that was mistakenly posted as an electrical designer position. Complainant, however, is not a mechanical designer. When Complainant contacted VECO about the job, she was advised of the mistaken posting. (TR 214-15, 277) The second job she applied for concerned the Senior Designer at P.S. 7, and she was hired for that position, and continues to work there. (CX 8; TR 226)

Complainant also raised an issue concerning alleged openings occurring after her layoff which were never posted, thus precluding her from applying.[81] Mr. Read and Mr. Ebersole, however, presented testimony concerning VECO's posting practices. Mr. Ebersole testified concerning VECO's policy as far as posting position openings. He stated that often positions were not posted due to the large amount of internal transferring that occurs from employees being moved from one project to another. (TR 1142) Further, he testified that VECO would not post an opening if they have received very short notice from a client requesting immediate resources, or where they are asked by a client for a specialized capabilities. (TR 1142) Mr. Read testified that he had the discretion to determine what was or was not posted and that many of the jobs available after March of 1997 were not posted. (TR 763-64)[82]

Complainant's Current Employment

On August 15, 1997, Complainant was offered re-employment with VECO to work on a British Petroleum contract. (CX 6) Complainant turned this position down, in part, because it only

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[80] This inquiry, however, was submitted to Mr. Brossia, an employee of the JPO who had no authority to make Complainant an offer of employment at VECO. (CX 39; TR 341-342) Complainant wrote a letter to Mr. Jerry Brossia of the JPO explaining her suspicion that she was being blacklisted. (TR 219)

[81] For example, during the summer and fall of 1997, there were positions that opened up that Complainant did not know about, such as: Mr. Klinker, Senior Drafter, left at P.S. 3 and was replaced by Wendy Eckle, a Brigalia contractor. (TR 194) Gabe Diaz, Senior Drafter, left P.S. 4, and was replaced by Mike Banks; and Mike Banks left and was replaced by Tony Moya, not a VECO employee. All were drafter positions but all the replacement people were designers. (TR 195)

[82] VECO has a practice in regards to posting positions, but it is not a policy. (TR 760) In regards to posting positions, Mr. Read would get a work order or e-mail from a manager, he would fill out an Alyeska form and Alyeska would sign off on it, then he would send the form to HR who would post. (TR 761-762) This procedure was done for the six downgraded positions, but Complainant was never given these forms in discovery. It was Mr. Read's discretion to post a position or not and he based this on how quickly the position needed to be filled. Mr. Read would have considered Complainant for any vacancy for which she applied, but he would not have selected her to any P.S. position that she might have applied for after her lay-off because she needed to be "in the house or closer to [his] supervision." (TR 765-766)

involved a short duration. (CX 7)[83] Instead, she accepted VECO's offer of re-employment for a Senior Designer with the DUP at P.S. 7. (VECO 43; TR 1131) This was a position that Complainant understood to have been budgeted through December 31, 1997. (TR 340-341)[84] The letter offering Complainant the position, however, stated that it was a regular, full-time position. (EX 43) Regardless, in an October 21, 1997 letter she requested to be selected to a baseline Designer/Drafter position at P.S. 7,[85] which she received. (CX 8) Complainant's current position at P.S. 7 is substantially the same to her prior employment at P.S. 3 in terms of salary and benefits. (TR 342, 408)

Mr. Read testified that VECO still had the concerns placing Complainant in a pump station position, but he testified that because P.S. 7 is relatively close to Fairbanks, that it would be more convenient to provide adequate supervision of Complainant at that location. (TR 887-890) Mr. Read was Complainant's supervisor when she was rehired. (TR 892) When the position became baseline funded, JoAnn Johnson in Fairbanks became the Complainant's supervisor.

Ms. Johnson, who became Complainant's supervisor on May 25, 1998, testified concerning her relationship with Complainant. She testified that she found Complainant to perform good work. Further, Ms. Johnson stated that she has not received any criticism regarding Complainant from ATLs. (TR 1322) Ms. Johnson, when asked about criticism, if any, of Complainant, stated that Complainant "needs to improve her conflict resolution between her peer groups, as well as her co-workers." (TR 1287) There was some dispute as to whether or not Complainant was unhappy with Ms. Johnson as a supervisor, however, Complainant has denied this statement. (TR 1361, 1397)[86]

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[83] I find the record slightly confusing on this issue. Apparently, Complainant agreed to the BP position, but continued to seek the P.S. 5 and P.S. 7 positions. She, however, did not actually work in the BP position because of the P.S. 7 opportunity soon thereafter. (TR 226)

[84] "Several people" made the decision to select Complainant to the P.S. 7 position, a two week on, two week off rotation only 63 miles from the Fairbanks Business Unit which would provide for closer supervision. This position was also subject to limited funding.

[85] According to Complainant, the position was rolled over to the base-line budget in June or July 1998. A baseline position has on-going funding. (TR 891)

[86] Ms. Johnson learned on August 28, 1998, through Ms. Julie Tucker, legal counsel for Alyeska in Fairbanks, that Complainant was unhappy with Ms. Johnson as a supervisor. (TR 1292) Ms. Johnson had felt that there was no conflicts, but then felt that Complainant had not been truthful in the past, especially when reading a comment on her change-out notes, where Complainant stated: "This action has happened before and will continue as long as there are people in the position to harass the employees." (VECO 62 at 16) Ms. Johnson's concern was that Complainant was not being forthright with her concerns. (TR 1294) Complainant, however, testified that she never spoke with Ms. Tucker concerning Ms. Johnson and that she has no concerns about Ms. Johnson as a supervisor. (TR 1361)

ECP Investigation

During the fall of 1997, Complainant raised many of these same claims in a complaint with Alyeska's ECP.[87] The ECP findings were later released on May of 1998, and substantiated some of Complainant's substantive safety claims, while dismissing other. I find that the general findings and conclusions of this investigation are not relevant, as the activities and investigation occurred after the alleged discriminatory activity in this present case, and because the actual validity of a whistleblower concerns is not relevant to this proceeding, so long as the concerns are reasonably believed by the employee. **See Seater v. Southern California Edison Co.**, 1995-ERA-13 (ARB Sept. 27, 1996). I find, however that several issues from the ECP investigation are relevant to the allegations and arguments raised in this claim, and therefore, must be briefly summarized.

First, on August 26, 1998, Mr. Gary Smith,[88] of ECP, made notes of a conversation he had with Jim Sweeney, the ECP manager. According to Mr. Smith, VECO Vice President, Mr. Ebersole told Mr. Sweeney that he, "has an issue with [Complainant's] performance, claims the working relationship is bad including the legal actions and performance issue with the [Complainant] are costing VECO money." (TR 502-06; CX 74 at 1160).

On the same day, Mr. Smith noted a conversation with Kathleen O'Connell who said that "she had heard from VECO Jodee Johnson that [Complainant] possibly had a performance problem. She said the [Complainant] was spending so much time working ECP issues that performance was becoming a problem." (CX 74 at 1160) Ms. Johnson, however, denied making any such comments. (TR 1321-22)

Additionally, a February 6, 1998 report of ECP investigator Holly Schoenborn stated that Ken Peacock, of the DUP team, told Ms. Schoenborn, that Mr. Ebersole called him and "asked if [Mr. Peacock] was going to lay off the [Complainant] anytime soon." (CX 69) At the hearing, Mr. Ebersole testified regarding this statement. He stated that he had heard a rumor that Complainant was going to be laid off, and that he contacted Mr. Peacock, in order to determine the rumor's

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After learning from Ms. Tucker that Complainant had problems with her, Ms. Johnson then contacted Kathleen O'Connell, at Ms. Tucker's suggestion. (TR 1300) She asked if she heard if Complainant had complaints about her supervision, and Ms. O'Connell had not heard of any. (TR 1301) Ms. Johnson did not discuss Complainant's performance issues. Complainant testified that she never had any conversations with Ms. Tucker. (TR 1362)

[87] ECP, an Alyeska voluntary initiative, serves as a venue for concerned employees to express their concerns. (TR 527)

[88] Mr. Gary Smith, an Employee Concerns Program representative with National Inspections and Consulting, who contracts with Alyeska, is responsible for investigating employee complaints out of the Fairbanks business unit.

validity, to inquire as to funding and possible lay off issues. (TR 1131-33) Mr. Ebersole testified that Mr. Peacock told him that he knew nothing of the rumor, or of any budgeting or scheduling changes.

Finally, the ECP report contains a paragraph which contains an allegation that VECO's policies created a "chilling effect" on potential whistleblowers. Specifically, the report provides Mr. Smith was told by Pat Higgins[89] that "VECO requires employees to get permission before contacting ECP and this has chilled the [Complainant]." (CX 68 at 25; TR 496) Mr. Smith, however, testified that he found no independent evidence that VECO caused a chilled environment by requiring employees to first approach it before going to the ECP. (TR 493-494) Further, Complainant testified herself that she was never discouraged from going to the ECP. (TR 420) Mr. Smith also noted that he was not aware, at the time of obtaining this information from Mr. Higgins, that Mr. Higgins had been recused from ECP investigations. (TR 539) If Mr. Smith had known this, he "would have most likely been more cautious in" his interview. (TR 539)

II. Discussion

This case proceeded to a full hearing on the merits. Accordingly, examining whether or not Complainant has established a *prima facie* case is no longer particularly useful. Once a respondent has produced evidence in an attempt to show that a complainant was subject to adverse action for a legitimate, nondiscriminatory reason, it no longer serves any analytical purpose to answer the

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[89] Mr. Higgins, an employee of National Inspection and Consulting since June 1998, was previously employed by Alyeska since August 1990. Part of his duties in 1995 included working with the ECP. Mr. Higgins first became acquainted with Complainant in the summer of 1996 and recalled that she began to raise technical issues in late 1996, early 1997. CX 80, dated October 21, 1996, indicated Complainant may want to report some additional concerns raised and Mr. Higgins believed that referred to the technical concerns. (TR 549) Although Complainant had not requested that ECP open a case file on those concerns at that time, she did discuss the fact that she was considering it. (TR 550-551) Mr. Higgins was not actively involved in the investigation of the Complainant's concerns in the fall of 1996, because Mr. Harry Kieling, ECP manager, decided it was better if Mr. Higgins was not actively involved in the investigation of VECO, with which Mr. Higgins had his own disagreements. (TR 551-552, 574) Mr. Higgins was involved with Complainant and her concerns because there were "concerns about an adequate review by the ECP investigator" and he sat in on the meeting with the state fire marshall. (TR 553) Mr. Higgins conveyed this information to Holly Schoenborn, the ECP investigator, Jim Sweeney, the ECP manager and Clyde Stewart, consultant at the ECP. Mr. Higgins spoke with people at the JPO about Complainant. In early 1997, Mr. Higgins spoke with Mr. Jones at the JPO. Mr. Higgins prepared CX 81 and it refers to gender and technical concerns, although it was prepared in response to Complainant's gender discrimination claims. Mr. Higgins did not speak with anyone at VECO regarding the Complainant's concerns at any time. (TR 577) Mr. Higgins had informed his supervisor, Mr. Kieling, that he had been threatened by VECO. He filed a DOL complaint against Alyeska that was settled. In a June 1997 memo, Mr. Higgins agreed that there may be concerns about his objectivity. (TR 579-580) and he had not been assigned to any VECO investigations as of June 1996. (TR 580-581; CX 81)

question whether the complainant presented a *prima facie* case. Instead, the relevant inquiry is whether the complainant prevailed by a preponderance of the evidence on the ultimate question of liability. **U.S.P.S. v. Aikens**, 460 U.S. 711 (1983); **Roadway Express v. Dole**, 929 F.2d 1060, 1063 (5th Cir. 1991); **Carroll v. Bechtel Power Corp.,** 1991-ERA-46 (Sec'y Feb. 15, 1995), **aff'd sub nom. Carroll v. United States Dept. of Labor**, 78 F.3d 352, 356 (8th Cir. 1996). With that in mind, this Administrative Law Judge shall consider whether, viewing all of the evidence as a whole, the Complainant has shown, by a preponderance of the evidence, that she was discriminated against for engaging in protected activity. **See Adjiri v. Emory Univ.,** 1997-ERA-36 (ARB July 14, 1998); **Boudrie v. Commonwealth Edison Co.**, 1995-ERA-15 (ARB Apr. 22, 1997); **Boytin v. Pennsylvania Power and Light Co.**, 1994-ERA-32 (Sec'y Oct. 20, 1995); **Marien v. Northeast Nuclear Energy Co.**, 1993-ERA-49/50 (Sec'y Sept. 18, 1995). To carry that burden, Complainant must prove that Respondents' stated reasons for terminating and subsequently failing to rehire the Complainant are pretextual, **i.e.**, that they were not the true reasons for the adverse actions and that the protected activity was. **Leveille v. New York Air Nat'l Guard**, 1994-TSC-3/4 at 4 (Sec'y Dec. 11, 1995); **Hoffman v. Bossert,** 1994-CAA-4 at 4 (Sec'y Sept. 19, 1995). It is not sufficient that Complainant establish that the proffered reasons were unbelievable; she must establish intentional discrimination in order to prevail. **Leveille v. New York Air Nat'l Guard**, 1994-TSC-3/4 at 4 (Sec'y Dec. 11, 1995).

I note, however, that in the present case, Respondents have not only presented evidence of legitimate, non-discriminatory reasons for their actions, but they have also argued that Complainant failed to prove by a preponderance of the evidence the basic elements of a so-called whistleblower claim; namely, that Complainant has failed to prove that she engaged in protected activity, that the Respondents knew of said protected activity, that she was subject to adverse action, and that Respondents discriminated against her because she engaged in protected activity. **See Dartey v. Zack Co. of Chicago**, 1982-ERA-2 (Sec'y Apr. 25, 983). I pause to note, that unlike the requirement that Complainant present a *prima facie* case, this inquiry is whether or not Complainant proved the elements of her claim by a preponderance of the evidence. Accordingly, I shall first address the Respondents' challenges that Complainant failed to meet the essential elements of her claim, and I shall then address Respondents arguments based on legitimate, non-discriminatory reasons for their actions.

Protected Activity

The Respondents first argue that Complainant has failed to prove that she engaged in protected activity.

In a whistleblower claim, the first element which a complainant must prove is that he or she engaged in protected activity. Under the cited statutes, protected activity can encompass bringing an action under the specifically named Act, testifying in such proceeding, or taking other action to carry out the purposes of the Act. **See Toxic Substances Control Act**, 15 U.S.C. § 2622(a);

Federal Water Pollution Act, 33 U.S.C. § 1367(a); **Solid Waste Disposal Act**, 42 U.S.C. § 6971(a); **Clean Air Act**, 42 U.S.C. § 7622(a). Reporting safety or environmental concerns under the named statutes intentionally to a regulatory or enforcement agency constitutes protected activity. Additionally, the Secretary of Labor has held that internal complaints about possible violations of the Acts should be regarded as protected activities. **Dodd v. Polysar Latex**, 1988-SWD-4 (Sec'y Sept. 22, 1994); **Scerbo v. Consolidated Edison Co.**, 1989-CAA-2 (Sec'y Nov. 13, 1992). This interpretations has been sustained by six courts of appeal, including the Ninth Circuit, under whose jurisdiction this case arises. **See Passaic Valley Sewerage Comm. v. Department of Labor**, 992 F.2d 474 (3d Cir.), **cert. denied**, 510 U.S. 964 (1993); **Pogue v. United States Dep't of Labor**, 940 F.2d 1287, 1289 (9th Cir. 1991); **Couty v. Dole**, 886 F.2d 147 (8th Cir. 1989); **Mackowiak v. University Nuclear Systems, Inc.**, 735 F.2d 1159, 1163 (9th Cir. 1984); **Kansas Gas & Electric Co. v. Brock**, 780 F.2d 1505, 1513 (10th Cir. 1985), **cert. denied**, 478 U.S. 1011 (1986); **Consolidated Edison Co. v. Donovan**, 673 F.2d 61 (2d Cir. 1982). The Secretary of Labor has held that an employee's concerns that "touch on" the environment can be protected activity, and that it is not necessary that the complaints have a direct effect on nuclear safety. **Dodd v. Polysar Latex**, 1988-SWD-4 (Sec'y Sept. 22, 1994).

In addition to raising concerns, either externally or internally, an employee must have a reasonable belief that his or her complaints concern potential violations of the named statutes. In **Minard v. Nerco Delamar Co.**, 1992-SWD-1 (Sec'y Jan. 25, 1994), the Secretary of Labor established the "reasonable belief" test that states that where a complainant makes a complaint with a reasonable belief that the item at issue is hazardous and regulated as such, he or she is protected. **Id.** The Secretary further clarified that it is not enough for an employee to believe that the environment may be negatively impacted by the employer's conduct, but rather, the employee's complaints must be grounded in conditions reasonable perceived to be violations of the environmental acts. **Id.; see also Johnson v. Old Dominion Security,** 1986-CAA-3/4/5 (Sec'y May 29, 1991); **Kesterson v. Y-12 Nuclear Weapons Plant,** 1995-CAA-12 (ARB Apr. 8, 1997). In analyzing whether or not sufficient "reasonable belief" exists, it is important to look at Complainant's training and experience in the field. **Minard v. Nerco Delamar Co.**, 1992-SWD-1 (Sec'y Jan. 25, 1994).[90]

Complainant argues she engaged in several instances of protected activity, both internally and externally. First, Complainant alleges that she repeatedly reported compliance failures regarding quality issue to engineers and ATLs at P.S. 3 from the Summer of 1996 through March of 1997. (TR 133-43) These issues involved concerns about minor modification packages, fire systems and NICET certificates, the lack of adherence to engineer Professional Engineering certification requirements, and issues based on engineers not properly signing off on red-line documents. (TR 133-43) Second,

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[90] In several decisions, an employee's particular and repeated concerns to a supervisor concerning safety issues been considered protected activity. **See, e.g.**, **Bechtel Constr. Co. v. Secretary of Labor**, 50 F.3d 926 (11th Cir. 1995); **Thomas v. Arizona Public Serv. Co**., 1989-ERA-19 (Sec'y Sept. 17, 1993); **Crosby v. Hughes Aircraft Co.**, 1985-TSC-2 (Sec'y Aug. 17, 1993).

Complainant raised these same complaints to individuals at JPO in November of 1996 and early 1997. Third, Complainant argues that the filing of her initial complaint with the Department of Labor on April 4, 1997, constitutes protected activity under the Acts. **McCuistion v. Tennessee Valley Authority**, 1989-ERA-6 (Sec'y Nov. 13, 1991). Finally, Complainant argues that her concerns involved potential violations of the named statutes, as the pipeline carries toxic substances, and that her concerns focused on improper and inadequate quality control measures which she viewed as a reasonable threat to the environment, and in violation of the named Acts.

Respondents, on the other hand, challenge the existence of protected activity, through the testimony of several witnesses who stated that Complainant's concerns were administrative issues, and in no way involved quality concern issues.

Based upon the totality of this closed record, I find and conclude that Complainant has proved by a preponderance of the evidence that she engaged in protected activity. Specifically, I find that Complainant engaged in protected activity under the relevant Acts, by raising quality control and safety concerns regarding: minor modification packages, red-line signatures and fire protection issues both internally to VECO and Alyeska, and externally to JPO and the Department of Labor. First, Complainant expressed her concerns to several employees of Alyeska in the NBU. The ATLs and engineers were aware of her concerns and her conflicts with Mr. Butter and Mr. Scheele regarding the minor modification packages and red-line signatures were well known. Further, Mr. Read and Mr. Rooney of VECO were informed of these concerns in December of 1996 through their interviews with Complainant, and several Alyeska employees.

In addition to her internal complaints, Complainant also raised these same issues externally, between November, 1996 and March, 1997, to the JPO and the Department of Labor. I must clarify, however, that while I find and conclude that Complainant's filing of her initial complaint is clearly protected activity, this finding is limited to Complainant's second complaint (non-selection issue). The filing of the April 4, 1997 complaint, however, does not constitute protected activity as to the allegations in that complaint, due to the fact that there is no evidence that Respondents knew she filed with the Department of Labor prior to the date of Complainant's lay off.

I also reject Respondents' argument that Complainant's concerns were merely administrative, and not quality or safety concerns. I conclude that Complainant's concerns involved safety issues. This finding is supported by, among other evidence, the fact that Complainant raised her complaints not just to the ATLs and Engineers, but also to quality control officials at both VECO and Alyeska. Further, ATL Haines testified that she viewed Complainant's concerns as safety issues, and spoke to a quality control generalist about Complainant's concerns. (TR 819-20)

Finally, I conclude that the record adequately demonstrates that Complainant had a reasonable belief that her complaints involved potential violations of the named statutes. Complainant had undergone training for her position, and was aware of several of the requirements and regulations that governed the activity at the pump station, especially concerning minor modification packages. Complainant's concerns go to the heart of environmental safety at the P.S. 3 and her concerns that

the perceived statutory violations constituted a safety and fire threat not only to the pump station, but to the surrounding ecosystem as well. Therefore, I reject Respondents' arguments that Complainant failed to meet her burden as to the existence of protected activity.

Respondent's Knowledge of Protected Activity

Respondents next argue that they were unaware of Complainant's protected activity.

A complainant must establish by a preponderance of the evidence that the respondents had actual or constructive notice of his or her protected activities. **Morris v. The American Inspection Co.**, 1992-ERA-5 (Sec'y Dec. 15, 1992); **Adjiri v. Emory Univ.**, 1997-ERA-36 (ARB July 14, 1998). The ARB has held that knowledge of protected activity cannot be imputed to higher management absent proof. **Mosley v. Carolina Power & Light Co.**, 1994-ERA-23 (ARB Aug. 23, 1996) Thus, the managers who affected a complainant's discharge must have had knowledge of the protected activity. **Scott v. Alyeska Pipeline Serv. Co.**, 1992-TSC-2 (Sec'y July 25, 1995). Further, as is obvious, a respondent's knowledge of protected activity must precede any adverse employment action, otherwise, the complaint is "doomed." **See Varnadore v. Oak Ridge Nat'l Laboratory**, 1992-CAA-2/5; 1993-CAA-1 (Sec'y Jan. 26, 1996) (and cited cases).

Complainant alleges that both Alyeska and VECO had knowledge of her quality control issues, prior to the adverse actions which were taken against her. Complainant cites to the change out notes (CX 43), especially her final note on March 10, 1997 (TR 177; CX 19), as proof that Alyeska was aware of the safety concerns Complainant raised. Complainant alleges that her concerns were well known to the Alyeska Engineers and other ATLs, because they were passed along, either through Alyeska employees, or directly from Complainant, to Mr. Read and Rooney at VECO.

Respondents, on the other hand, argue that they were unaware of any quality control issues until learning about the impending JPO investigation the day after Complainant was laid-off. VECO also argues that only Alyeska employees had knowledge of Complainant's alleged activity since Complainant was the only VECO employee stationed at P.S. 3. Further, VECO argues that the concerns only involved inter-personal conflicts, and not safety or environmental concerns.

However, again based on the totality of this closed record, I reject Respondents arguments, and conclude that Respondents were aware of Complainant's protected activity. Complaint raised her concerns about the minor modification, and red-line issues to Engineers and ATLs, and her conflict with Engineer Butter was well known. Additionally, Complainant listed and described her concerns in her change-out notes, most specifically in her March 10, 1997 notes. (CX 19) Further, Complainant raised her red-line signing issue, and accompanying fire protection issue, to Engineer Scheele, as well as Ms. Stinson, and Mr. Kinney. An e-mail concerning this issue was also forwarded to Mr. Read of VECO in February of 1997. (CX 23) Additionally, ATL Haines testified that she was aware of Complainant's concerns regarding the minor modification issues as well as the fire protection, and Mr. Pomeroy testified that in late 1996 or early 1997, he became aware of the red-line issue. (TR 1238) Complainant also raised these concerns to Alyeska quality engineer, Mr. Mann.

(TR 1344). Further, these concerns were conveyed to VECO by both Complainant and Alyeska employees during the December 1996 interviews, the January 8, 1997 meeting, and through documents sent to Mr. Read. (CX 23) Complainant also shared her quality concerns with a VECO quality Engineer. (TR 1346)[91]

I also reject VECO's argument that only Alyeska employees knew of any activity, and that VECO had no knowledge. While it is true that Complainant was the only VECO employee at P.S. 3, VECO's argument blatantly disregards that fact that the Alyeska employees, and Complainant herself, informed the VECO supervisors, Mr. Read and Mr. Rooney, of the quality concerns Complainant was raising. Further, Mr. Read was copied on, or forwarded, e-mails dealing with the red-line signature and fire protection issues that involved Complainant and Mr. Scheele. Thus, I reject Respondents' arguments, and conclude that Complainant has proved by a preponderance of the evidence the Respondents knew of her protected activity.

The fact that Respondents argue that Complainant's concerns merely were thought of as administrative concerns is unpersuasive, and disingenuous, reasoning. **See Jones v. EG&G Defense Material, Inc.,** 1995-CAA-3 (ARB Sept. 29, 1998). I find that Complainant raised safety concerns to fellow employees, as well as safety officials at both Alyeska and VECO. Further, ATL Haines testified that Complainant's concerns prompted her to consult with a quality generalist. (TR 776-79; 819-20) Thus, I reject this argument, and conclude that Complainant's protected activity was known to Respondents.

Finally, I note that assuming Respondents only learned of the JPO investigation after Complainant's lay off, that would still qualify as adequate knowledge of protected activity as to Complainant's second complaint, based on blacklisting/failure to hire grounds.

Complainant was Subject to Adverse Action

Respondents next challenge Complainant's claim that she was subject to adverse action, on a number of grounds.

Essential to all whistleblower claims is evidence that a Complainant was subject to adverse action by the Respondents. **Dartey v. Zack Co. of Chicago**, 1982-ERA-2 (Sec'y Apr. 25, 1983). In **Stone & Webster Engineering Corp. v. Herman**, 115 F.3d 1568 (11th Cir. 1997), the Eleventh Circuit defined an adverse action as "simply something unpleasant, detrimental, even unfortunate, but

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[91] I find that the present case is factually distinguishable from **Adjiri v. Emory University**, 1997-ERA-36 (ARB July 14, 1998). **Adjiri** involved a situation where the respondent was only made aware of interpersonal conflicts between the complainant and co-workers. VECO, however, learned not only of the inter-personal conflicts between Complainant and Alyeska, but also of the minor modification and red-line log issues that Complainant had raised that created the friction.

not necessarily (and not usually) discriminatory." **Id.** at 1573. Several actions have been held to be "adverse actions," such as:

- blacklisting, or "distinguishing in the treatment of employees by marking them for avoidance." **Leveille v. New York Air Nat'l Guard**, 1994-TSC-3/4 (Sec'y Dec. 11, 1995);
- demotions, or reductions in salary. **Carter v. Electrical Dist. No. 2 of Pinal County**, 1992-TSC-11 (Sec'y July 26, 1995);
- Discharge or lay off. **Mackowiak v. University Nuclear Systems, Inc.**, 735 F.2d 1159 (9th Cir. 1984); **Emory v. North Bros. Co.**, 1986-ERA-37 (Sec'y May 14, 1987)
- Failure to hire, or non-selection. **Frady v. Tennessee Valley Authority**, 1992-ERA-19/34 (Sec'y Oct. 23, 1995); **Samodurov v. General Physics Corp.**, 1989-ERA-20 (Sec'y Nov. 16, 1993).
- Harassment and Ridicule. **Saporito v. Florida Power & Light Co.**, 1990-ERA-27/47 (Sec'y Aug. 8, 1994); **Nichols v. Bechtel Constr., Inc.**, 1987-ERA-44 (Sec'y Oct. 26, 1992).

In the present case, Complainant alleges that she was subject adverse action in the form of being laid off, blacklisted and not selected for employment, and harassed.

Lay Off

Complainant argues that her rejection from the downgraded position and her lay off constitutes adverse action. Respondent VECO does not address or challenge the existence of adverse actions in regard to Complainant's lay-off, rather VECO argues that any such actions were legitimate and non-discriminatory. Respondent Alyeksa, however, challenges this claim arguing that it is not an employer subject to liability under the Act, and that any adverse action was taken by VECO, not Alyeska.[92]

[92] This issue was first raised on July 25, 1997, when Respondent Alyeska submitted a Motion to Dismiss itself from this matter, arguing that it was never Complainant's employer, and that Complainant was actually employed by Respondent VECO Engineering, an independent contractor which operates as a separate entity, maintaining independent ownership, management and employees. (ALJ EX 13) Complainant responded to Alyeska's motion by arguing that Alyeska was engaging in a "factual attack" and that issue must be resolved only after a full hearing on the merits. I agreed with Complainant, and on August 28, 1997, issued an Order Denying Respondent Alyeska's Motion to Dismiss, noting, "The Motion and Opposition place the issue of Respodent Alyeska's status as Complainant's employer directly in controversy and the result of this controversy is resolved by a factual determination." (ALJ EX 19) Now, after a full hearing and a review of this full record, it is time to revisit this threshold issue.

Alyeska argues that it is not an "employer" under the language of the applicable statutes, and therefore, that it cannot be held liable in this case. Alyeska stresses that it had no involvement, either direct or indirect, with VECO's termination and selection decisions, and that the facts do not present a situation where both VECO and Alyeska can be found to be "joint employers." Rather, Alyeska argues that Complainant is requesting that this Court hold it jointly and severally liable, in strict liability, for the independent acts of the independent contractor.

Complainant, on the other hand, argues that the facts present a situation where Alyeska had sufficient control over Complainant to qualify as a joint employer, and that Alyeska actually engaged in adverse action against her.

I find and conclude that Respondent Alyeska qualifies as an Employer under the Acts, and therefore, can be held liable for engaging in adverse action against Complainant.

Each of the statutes implicated by Complainant prohibit either any "persons" or "employer" from discharging or discriminating against "any employee" because that employee engaged in protected activity.[93] Regardless of this difference, the Secretary of Labor has held that a respondents' liability under these so-called whistleblower statutes is premised on a finding that it qualifies as an "employer." **See, e.g., Reid v. Methodist Medical Center of Oak Ridge**, 93-CAA-4 (Sec'y Apr. 3, 1995) The statutory language does not define "employer," therefore the Secretary of Labor, following the Supreme Court's ruling in **Nationwide Mutual Ins., Co. v. Darden**, 503 U.S. 318 (1992), has adopted the use of "right to control test," to determine if a named-respondent qualifies as an employer under the common law test. The **Darden** test involves analyzing a number of factors to determine "the hiring party's right to control the manner and means by which the product is accomplished." **Id.** at 322-23. In making this determination, the **Darden** Court enumerated a number of factors, including:

> the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

See id. (quoting Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989).

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[93] **Toxic Substances Control Act**, 15 U.S.C. § 2622(a); **Federal Water Pollution Act**, 33 U.S.C. § 1367(a); **Solid Waste Disposal Act**, 42 U.S.C. § 6971(a); **Clean Air Act**, 42 U.S.C. § 7622(a).

The ARB in **Stephenson v. National Aeronautics & Space Admin.**, 1994-TSC-5 (ARB Feb. 13, 1997), held that a respondent can be held liable for retaliating against 'any employee' if it had acted as a employer with regard to the employee, e.g., "by establishing, modifying or interfering with an employee of a subordinate company regarding the employee's compensation, terms, conditions or privileges of employment." The Board went on to state:

> in a hierarchical employment context, an employer that *acts* in the capacity of employer with regard to a particular employee may be subject to liability under the environmental whistleblower provisions, notwithstanding the fact that that employer does not directly compensate or immediately supervise the employee. A parent company or contracting agency acts in the capacity of an employer by establishing, modifying or otherwise interfering with an employee of a subordinate company regarding the employee's compensation, terms, condition or privileges of employment. For example, the president of a parent company who hires, fires or disciplines an employee of one of its subsidiaries may be deemed an "employer" for purposes of the whistleblower provisions. A contracting agency which exercises similar control over the employees of its contractors or subcontractors may be a covered employer.

Id. (emphasis in original). On reconsideration of the **Stephenson** decision, the ARB upheld its prior ruling and again stressed the importance of analyzing the "employment relationship," and noted: "The employment relationship may exist between the complainant and the immediate employer. In the appropriate circumstances, however, protection may extend beyond the immediate employer." **Stephenson v. National Aeronautics & Space Admin.**, 1994-TSC-5 (ARB Apr. 7, 1997)

Similar issues arise in situations of joint employment. In **Palmer v. Western Truck Manpower**, 85-STA-6 (Sec'y Jan. 16, 1987), the Secretary of Labor delineated a number of criteria to determine whether or not two entities are joint employers: (1) inter-relation of operations; (2) common management; (3) centralized control of labor unions; and (4) common ownership. The Secretary, adopting the reasoning of the Administrative Law Judge, noted that the most important concern is the interrelation of operations. **Id.** It is not enough, however, to impose liability for an entity to merely be deemed a "joint employer," rather that employer must knowingly participate in the alleged adverse actions. In **Carrier Corp. v. NLRB**, 768 F.2d 778 (6th Cir. 1985), the Sixth Circuit Court of Appeals held that an independent contractor cannot be held liable for an unfair labor practice of a perpetrator, unless the independent contractor knowingly participated in the discriminatory practice. Therefore, if the independent contractor is entirely "innocent and unconscious" of the activity, it will be spared liability. **Id.** at 783 (quoting **NLRB v. Glueck Brewing Co.**, 144 F.2d 847 (8th Cir. 1944)).

I find and conclude, based on the evidence of record, that there is sufficient evidence, that Alyeska can be held liable as an Employer under the Acts, both as a joint employer with VECO, and, in the alternative, as an Employer under the **Darden** standard. During the time period in question, Alyeska controlled several aspects of Complainant's job, namely: the location of her work site, her

travel to and from the site, and her work schedule. Further, Alyeska owned the facilities where Complainant worked and lived, while on-duty, as well as the equipment she used to perform her duties as a designer. Additionally, Alyeska's ATLs Haines and Hilgendorf, served as Complainant's "functional supervisors." VECO supervisors have acknowledged that they provided little supervision to Complainant, and that it was the Alyeska employee's who had day-to-day contact and supervision of Complainant. The actions at issue, alleged by Alyeska to be taken solely by VECO employees, were made based upon feedback and the opinions of several Alyeska employees, especially the engineers, ATLs and DUP team. I find the actions and relations between VECO and Alyeska were closely inter-related, to the point where VECO supervisor Mr. Read candidly admitted that VECO did whatever Alyeska wanted. Alyeska also knowingly participated in several adverse actions against Complainant which culminated in her eventual non-selection and lay off. For instance, Alyeska employees, upon learning of Complainant's safety concerns as to minor modification packages, called a meeting and greatly reduced Complainant's minor modification duties; an area in which Complainant had considerable expertise and had written an instructive manual on. Further, Alyeska ATLs and Engineers raised several complaints to VECO supervisors which were almost exclusively relied upon in the non-selection and lay off decisions. Therefore, I find that sufficient evidence exists to find that Alyeska is potentially jointly liable under the Act, should Complainant succeed on her claim.[94]

In making this ruling, I am aware of the facts put forth by Alyeska against finding any employer/employee relationship.[95] Nevertheless, this Administrative Law Judge, when looking at all the evidence in the aggregate, finds and concludes that the characteristics of the relationship listed far outweigh the fact that Complainant was actually paid and hired by VECO. Thus, I conclude that both Respondent Alyeska and VECO can be held liable in this matter. Finally, I note that should a reviewing authority conclude that Alyeska was not a joint employer under these circumstances, I find

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[94] Finally, I note that Alyeska's policy on co-employment is in the record at CX 71 at APSC 0483. In that policy, Alyeska acknowledges that whenever Alyeska has the right to control and direct the daily work, conditions, hours, equipment and training for contractor employees it is troubling to the company because of liability.

[95] Notably, Alyeska stresses that it was not responsible for, nor did it engage in, the hiring, firing, or disciplining of any VECO employees. (TR 635-36; 807-08; 915-16) Further, Alyeska noted that it does not conduct performance reviews of VECO employees. Additionally, Alyeska does not have any input into VECO salaries, bonuses or benefit decisions. Alyeska acknowledged that Complainant received some supervision from the engineers (which were employed by either Alyeska or VECO) and that the ATLs supervised all on-site workers, however Alyeska argues that such "nominal control," is insufficient for liability. Further, Alyeska notes that ATLs were not responsible for assigning Complainant's day-to-day tasks. (TR 772) Alyeska stresses that it had no right or opportunity to exercise any control over VECO's management decisions, and further, that it did not knowingly participate in any was in VECO's decision process in regard to Complainant's non-selection issue.

and conclude that Alyeska can still be held liable for its actions in regard to Complainant's first claim of discrimination.

I note, that in finding that both VECO and Alyeska subjected Complainant to adverse action, I view their actions as a whole, without separating each moment for individualized analysis in a vacuum. Rather, I find that the events and actions occuring from the Fall of 1996 until March of 1997, constitute a seamless web of actions that, especially when viewed in the aggregate, constituted adverse action against Complainant, culminating in the non-selection and lay-off. I find that Alyeska's actions cannot be confined to the December 1, 1996 meeting, because the record actual shows a much stronger presence. Alyeska argues that the decision to hire was in December 1, 1996, and after that its hands are clean of any action involving Complainant. I find this statement hollow for several reasons. First, despite claims that the decision was finalized on December 1, 1996, on December 10, 1996, Ms. Haines was still inquiring of VECO supervision with Respodent to the differing costs for differing staffing levels. (CX 21) Therefore, I conclude that no finalized decisions were made at that time. Further, through December to March, Alyeska Engineers and ATLs acted with discriminatory motive to influence VECO's non-selection and removal decisions involving Complainant. Many of the complaints alleged by Alyeska employees were rooted in the October 15, 1996 Alyeska meeting, of which VECO had no knowledge at the time, where Alyeska employee's stripped Complainant of her minor modification duties. The Alyeska employee's statements were heavily relied upon by Mr. Read and VECO in deciding to not select Complainant for the downgraded positions, and laying her off in March of 1997. Further, Mr. Read testified that Alyeska supervisors requested that he counsel Complainant before allowing her to return to P.S. 3 in early January, 1997. (TR 701-02) Finally, I must note the testimony of Mr. Read who acknowledged, quite clearly and most candidly, that VECO does what Alyeska wants. (TR 704, 729) Therefore, I find and conclude that the factual record presents ample evidence of Alyeska remaining active in determining Complainant's fate as a VECO employee, at the Alyeska work-site, far beyond the date of December 1, 1996. Further, I find and conclude that this action constitutes adverse action against Complainant, for which both Respondents can be held liable, provided Complainant satisfies her burden of proving that Respondents took this actions in retaliation for her protected activity.

Harassment

Complainant has alleged that she has undergone adverse action in being harassed by co-workers, in the form of unfair performance criticism, ridicule, removal for minor modification responsibilities, being subject to harassing phone messages, and having to undergo meeting which were disciplinary in nature.

I find and conclude that Complainant has met her initial burden regarding this claim, for the previously stated reasons. The actions of removing Complainant from minor modification work, as well as the interpersonal criticisms, are forms of adverse action. The record contains many such examples, including when Mr. Butter called Complainant mentally ill, in response to the minor modification issues she raised. (TR 1356; CX 92(a)) I do not, however, view the phone messages during December 1996, and January 1997, as a form of harassment, since Complainant did not return

the calls and the messages indicated that a response was time-sensitive. Further, upon listening to audiotapes of some of the calls, I do not find Mr. Read's tone or language in any way indicative of harassment.

Blacklisting/Failure to Hire

Complainant contends that the Respondents' failure to hire her for a position between March 24, 1997 and August 17, 1997, constituted a continuing adverse employment action motivated by her protected activity. In the present claim, Complainant filed a second complaint on August 1, 1997, alleging that she was subject to a continuing violation of the acts, as she "diligently sought" 35 positions, for which she was qualified, through VECO on the Alyeska Pipeline and had "repeatedly been denied consideration." (CX 13; TR 220-21) Complainant also relies upon the testimony of Mr. Read who testified that between March and August of 1997, he would not have hired Complainant for any positions, because she needed closer supervision. (TR 765)

Respondents VECO and Alyeska, however, challenge the existence of any adverse action, and argue that Complaiant has not met her burden of proof and production. Specifically, Respondents argue that complainant did not apply for the positions, and thus cannot argue that she was discriminated against for not being hired. Respondent Alyeska also argues that any alleged adverse action taken in regard to the failure to hire/blacklisting claim, was taken solely by VECO, and that there is no proof of any adverse action by Alyeska.[96]

I agree with Respondents. In order to sustain a claim for blacklisting, or failure to hire, a complainant must first prove that she applied for a position with respondents. **See McDonnell Douglas Corp. v. Green**, 411 U.S. 792, 802 (1973); **Brown v. Coach Stores, Inc.**, 163 F.3d 706, 710 (2d Cir. 1998). The Administrative Review Board has held: "To show that an adverse action occurred in cases of failure to hire or failure to rehire, complainants must show that they were qualified for the position, that they applied for it or that the employee was otherwise obligated to consider them, and that the employer hired another individual not protected by the Acts or the position remained vacant after the application was rejected." **Holtzclaw v. United States Environmental Protection Agency**, 1995-CAA-7 (ARB Feb. 13, 1997); **see also Samodurov v. General Physics Corp.**, 1989-ERA-20 (Sec'y Nov. 16, 1993). In **Holtzclaw**, the complainant did not prove that he had requested or applied for renewal of his position or that the respondent was otherwise obligated to consider him for renewal and, therefore, the Board held that there was no adverse action.

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[96] I note, however, that Alyeska's actions in the form of criticisms by Alyeska managers and engineers clearly affected Mr. Read and VECO's decision making process. Nevertheless, I find and conclude that as Complainant did not meet her burden of persuasion on this issue, it is not necessary for me to delve any further into the issue of whether or not Alyeska engaged in adverse action in this regard.

In the present case, Complainant was laid off on March 24, 1997, and did not make any action as far as a job search with VECO until she sent a June 18, 1997 letter to request that VECO "accept and process [her] resume for job positions available that are of equal character & nature to the position [she] was laid off from in March of 1997." (CX 1) VECO responded on June 19, 1997, providing Complainant with a listing of current openings and instructing her to let VECO know of which specific jobs she sought. (CX 2) Complainant responded, but instead of inquiring about specific openings, she provided a list of job requirements as to pay, scheduling and environment, together with a request for permanent employment status and benefits and continuation of seniority with the company. (CX 2) On June 30, 1997, Ms. Otto from VECO responded to Complainant, expressly stating, "[W]e will continue to consider your resume only for those positions in which you specifically indicate an interest." (CX 3) Despite this instruction, Complainant failed to file specific applications, with the exception of two openings.

Initially, I find and conclude that Respondents did not have any obligation to consider Complainant for any positions, absent a specific application, as expressly and clearly instructed by VECO. Complainant's letters relaying her general requirements for a position fail to rise to the level of applications for the 35 positions listed in the second complaint, because those correspondences were not specific job inquires. Further, Complainant has presented no evidence as to why she did not file specific applications.

Complainant also argues that she was discriminated against because she could not apply to the positions which were not posted by VECO. Initially, I note that VECO is not required to post all job openings. Further, I find and conclude that Mr. Read and Mr. Ebersole clearly and adequately testified to the reasons and circumstances that prompt VECO to post, and not post, certain openings. Therefore, I find and conclude that Respondents were not obligated to consider Complainant for any position for which she did not apply. Accordingly, the only way for Complainant to establish by a preponderance of the evidence that she was subjected to adverse action in the form of blacklisting and failure to be hired, is to prove that she applied for positions for which she was qualified, was not chosen, and that Respondents either chose a non-protected individual, or that the position remained vacated after the application was rejected. **See Holtzclaw v. United States Environmental Protection Agency**, 1995-CAA-7 (ARB Feb. 13, 1997). I find and conclude that Complainant has failed to do that.

The record only contains evidence that Complainant sought out, and applied for two individual openings. First, Complainant applied for a position advertising for an electrical designer at P.S. 5. (TR 197, 214-15, 177) Complainant applied for this position, but was told that the listing was erroneously posted as an electrical designer position, however, the position was for a mechanical designer position. Complainant has submitted no evidence to show that this mistake was merely pretext for not hiring her, or that the move was a method of intentional discrimination. Rather, the facts show that she applied for the erroneously listed position, and that the actual position required a mechanical designer, a position for which Complainant was not qualified. Therefore, any blacklisting or failure to hire claim, in regard to this position, must fail. Next, Complainant applied for the Senior Designer position at P.S. 7, for which she was eventually hired as a full-time, base-line

employee. (CX 8; TR 226) Therefore, Complainant has failed to satisfy her burden of proving by a preponderance of the evidence that she was subject to adverse action in the form of blacklisting/failure to hire, as to positions for which she never applied. Accordingly, Complainant's claims stemming from her second complaint are hereby **DENIED**.[97]

Adverse Action because of Protected Activity

As previously noted, Complainant has shown that she engaged in protected activity and that she suffered adverse employment action when she was laid off in March of 1997. Complainant must now establish by a preponderance of the evidence, that the protected activity was the likely reason for the adverse action. **See, e.g., Haubold v. Grand Island Express Inc.**, 1990-STA-10 (Sec'y Apr. 27, 1990); **Stack v. Preston Trucking Co.**, 1986-STA-22 (Sec'y Feb. 26, 1987); **Dartey v. Zach Co. of Chicago**, 1982-ERA-2 (Sec'y Apr. 25, 1983). Proximity in time between protected activity and an adverse action is solid evidence of causation. **White v. The Osage Tribal Council**, 1995-SDW-1 (ARB Aug. 8, 1997); **see also Goldstein v. Ebasco Contractors, Inc.**, 1986-ERA-36 (Sec'y Apr. 7, 1992).

Complainant has argued that all of the adverse action taken by Respondents, including harassment, reorganization, non-selection and layoff, were due to her raising of quality concerns. Both Respondents, however, have submitted evidence of legitimate, non-discriminatory reasons for their actions. Therefore, in order to conclude whether or not Complainant met her burden as to the ultimate question of liability, I must now turn my analysis to Respondents' proffered reasons for subjecting Complainant to adverse action, and whether or not Complainant has proved those reasons pretextual.

Legitimate, Non-Discriminatory Reason for Adverse Action

As Complainant has proved the elements of her case, Respondents have the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, nondiscriminatory reasons. **See Morris v. The American Inspection Co.**, 1992-ERA-5 (Sec'y Dec. 15, 1992). Significantly, the Respondents bear only a burden of production, as the ultimate burden of persuasion of the existence of intentional discrimination results with the Complainant. **Texas Dep't of Community Affairs v. Burdine**, 450 U.S. 248, 254-55 (1981); **Dartey v. Zack Co. of Chicago**, 1982-ERA-2 (Sec'y Apr. 25, 1983). An

[97] Finally, I reject Complainant's arguments about the significance of Mr. Read's testimony that he would not have hired Complainant for any positions between March and August of 1997, because of the need for supervision. I find that Mr. Read's testimony is unpersuasive as to the failure to hire claim, as it does not excuse Complainant's failure to apply to positions as instructed. There is no evidence that Complainant knew of Mr. Read's statements at the time, and that she relied upon it to conclude that any application would be futile. Accordingly, I find that Mr. Read's statements in no way excused Complainant from having to follow the clear instructions from VECO that she should individually apply for positions in which she was interested.

employer's discharge decision is not unlawful even if based on mistaken conclusions about the facts, however, a decision will only violate the Acts if it was motivated by retaliation. **Dysert v. Westinghouse Electric Corp.**, 1986-ERA-39 (Sec'y Oct. 30, 1991).

Respondents contend that Complainant was not selected for a downgraded position and laid off from her employment for legitimate, non-discriminatory reasons. Specifically, Alyeska argues that its December reorganization decision was due to severe budgetary constraints, and the need to address the issue of drawing backlogs. Alyeska asserts that Complainant's name was never brought up during those decisions. VECO argues that the non-selection and layoff were all valid. First, VECO argues that Complainant was offered a position in Anchorage, and that it was only after she refused this offer that she was laid off. Further, Respondents argue that Complainant was not chosen for the down-graded positions because of her negative attitude, and inability to get along with co-workers. This is because: she was hostile, could not resolve conflicts, locked her office, kept a password on her computer, was combative with engineers, refused to return calls, refused to make red-line changes, and was withdrawn and difficult to work with a the remote site. VECO also argued that Complainant required closer supervision, and therefore, she was not selected for a remote position where there was little VECO supervision for fear of jeopardizing its relationship with Alyeska.

I note that inter-personal friction caused by a complainant's inter-personal style may be a valid, nondiscriminatory reason for termination. **See Jarvis v. Battelle Pacific NW Laboratory**, 1997-ERA-15 (ARB Aug. 27, 1998) Nevertheless, I conclude that Respondents have not set forth any legitimate reason for not selecting Complainant for the downgraded position, and for her eventual layoff.

I must again restate my rejection of Alyeska's claim that its actions were limited and confined to the December 1, 1996 decision to reorganize the NBU. Despite Alyeska's claims, the record shows that ATL Haines continued to inquire about the plans after that date. Further, while ATL Haines testified that Complainant's name was never brought up in connection with the reorganization decision, her notes contradicted her testimony. In fact, ATL Haines's note for December 10, 1996, specifically mentions both Complainant name and the down-graded positions, while writing about possible changes due to the reorganization. (CX 18 at APSC 0404) Finally, I find that Alyeska Employees provided negative information to VECO and requested that VECO meet with Complainant prior to her return to P.S. 3 in January, 1997. Alyeska ATLs and Engineers then relayed complaints to VECO officials about Complainant, which stemmed from her protected activities. It is extremely significant to note that Alyeska Engineers had a good working relationship with Complainant until she started to raise quality concerns about the minor modification packages and the red-line signatures, after which the relationship deteriorated.

I also find and conclude that the reasons offered by VECO for not selecting Complainant for a down-graded position are illegitimate and pretextual because they either involved resolved issues, or arose out of, and were intertwined with, Complainant's protected disclosures. Mr. Read's testimony clearly reflected a candid admission that Complainant was not chosen because she was

difficult to work with. All of the reasons for Mr. Read's conclusions can be divided into three separate categories: previously resolved issue, the Anchorage issue and opinions tied to protected activity.

First, Respondents point to a number of troubled circumstances during Complainant's career with VECO where interpersonal problems arose, such as Complainant's missing of training, and her refusal to provide time cards. The testimony of Mr. Read, however, clearly stated that these conflicts were resolved prior to Complainant's promotion to Senior Designer in the summer of 1996. (CX 19; VECO 39). Further, ATL Haines testified that the issues regarding computer passwords and locks were resolved prior to the December, 1996 interviews with Mr. Read and Mr. Rooney. (TR 827-38) Thus, Alyeska employees were attempting to influence VECO to remove Complainant based, in large part, on already resolved claims.

Second, I reject Respondents' argument that Complainant was laid off only after she rejected the Anchorage position. Both Mr. Read and Mr. Ebersole testified that an offer was made. Complainant, however, testified that she was never offered the Anchorage Job and that she would have accepted it had it been offered.

I find and conclude that there is insufficient evidence that a position in Anchorage was offered to Complainant. I find it significant that despite the fact that VECO's Human Resources department requested Mr. Read to keep detailed notes of contact with Complainant, he was unable to present any evidence that the position was offered. Further, I find that Mr. Read's assertion is not supported by the evidence. Mr. Shipley, who Mr. Read said knew of the offer, did not testify. Mr. Ebersole testified in a contradictory manner and unconvincingly about this matter. Additionally, VECO's report to Alyeska's ECP on the reason for Complainant's termination contained no reference to a rejection of an Anchorage offer as a reason for the lay off. Additionally, according to Mr. Kinney's testimony, in December of 1996, Mr. Rooney commented that moving Complainant to Anchorage was not possible and that he was "directed not to do that." (TR 985, 1041-42) Further, I reject Respondents' argument that the comment made by Earl Hall in January, stating that anyone who was not selected for a remote site position would be reassigned to a position in town (CX 42 at JS 0050), should have put Complainant on duty to inquire about such positions, in absent of it being offered prior to her lay off. Thus, I conclude, in light of all the surrounding circumstances, that Mr. Read's testimony is insufficient to prove that a job in Anchorage was offered and rejected. Accordingly, I find that Complainant's alleged rejection of the "Anchorage offer" is not a legitimate reason for her termination.

Finally, I reject Respondents' claim that Complainant's inter-personal problems, and need for supervision, constitute legitimate, non-discriminatory reason for not selecting her for a down-graded position and laying her off. Respondents' concerns, and specifically Mr. Read's belief, that Complainant required a great deal of supervision, was formed as a result of the December interviews with Alyeska employees and DUP team members. The complaints regarding Complainant that were raised were directly related to her protected activity. The Respondents allege that Complainant was uncooperative, but their basis for this opinion is that she refused to compromise her safety concerns.

The animosity which resulted led several Alyeska employees to refer to complainant as: having a "chip on [her] shoulder," not being a "team player," being an "800-pound elephant in the living room," and most significantly, a "whistleblower." Accordingly, I conclude that the Respondent's propounded "legitimate, non-discriminatory reason" for not selecting Complainant for a down-graded position and laying her off, is actually tainted, as the basis for these "legitimate" reasons was really in retaliation for her engaging in protected activity. I find this situation closely analogous to **Passaic Valley Sewerage Commissioners v. United States Dep't of Labor**, 992 F.2d 474 (3d Cir.), **cert. denied**, 50 U.S. 964 (1993), where the Third Circuit held, where there was "no evidence that the Complainant's alleged personality or professional deficiencies [in interpersonal relations] arose in any other context outside his complaint activity," the Respondent's conclusion that the Complainant had a personality problem or deficiency of interpersonal skills was reducible in essence to the problems of the inconvenience the Complainant caused by his pattern of complaints. **Id.** at 481; **see also Dodd v. Polysar Latex**, 1988-SWD-4 (Sec'y Sept. 22, 1994) (concluding that what respondent viewed as poor attitude was nothing more than the result and manifestation of the Complainant's protected activity). I agree that this case presents a situation where all of Respondents' alleged "legitimate" reasons, are essentially complaints about the inconvenience and difficulties caused by Complainant raising safety concerns. Therefore, I find and conclude that Respondents have failed to produce a legitimate, non-discriminatory reason for subjecting the Complainant to adverse action, and as a result, Complainant has met her claim for intentional discrimination and is entitled to damages. If, however, a reviewing authority concludes that Respondents have provided legitimate, non-discriminatory reasons for their actions, then I find and conclude that Complainant has proven that any such reasons are pretextual, as shall now be discussed.

Pretext

I find and conclude that Complainant has presented adequate evidence to prove not only that the Respondents' proffered reasons for any adverse action pretextual, but also that the Complainant was harassed and laid off in retaliation for engaging in protected activity. **Leveille v. New York Air Nat'l Guard**, 1994-TSC-3/4 (Sec'y Dec. 11, 1995). Respondents allege that Complainant was not selected for a downgraded position and laid off because she was not a team player, and required more supervision than was available at any of the remote pump stations. I find and conclude that Complainant has proven that those reasons are invalid, as the real motivation concerned her protected activity. Further, I conclude that Complainant has proven that Respondents intentionally discriminated against her for engaging in protected activity.

Initially, I note that the Board has held that a supervisor's use of the expression "team player" was reasonable and non-discriminatory where the supervisor's basis for using the phrase was due to the complainant's uncooperative and disrespectful attitude. **See Odom v. Anchor Lithkemko**, 1996-WPC-1 (ARB Oct. 10, 1997). Further, I am cognizant of the fact that engaging in protected activity does not permit an employee to be absolved from any abuses by "overstepping the defensible bounds of conduct." **Dunham v. Brock**, 794 F.2d 1037, 1041 (5th Cir. 1986); **see also McDonald v. University of Missouri**, 1990-ERA-59 (Sec'y March 21, 1995); **Lopez v. West Texas Utilities**,

1986-ERA-25 (Sec'y July 26, 1988). Nevertheless, I find that Respondents' allegations are invalid and merely disguised their true discriminatory intent.

Any inter-personal problems involving Complainant stemmed from her engaging in protected activity. Complainant, engineer Kinney, and others, all testified that their relationship was good, up until Complainant started raising her concerns as to minor modification packages and other quality concerns.[98] At this time, Mr. Kinney began to describe Complainant as being "militant" and not a team player. (TR 978) He testified that his opinion stemmed from his frustration with the fact that Complainant was so adamant about her quality concerns. In fact, Mr. Kinney stated that he called the Complainant "militant" because she took a strong stand on issues where he thought she was incorrect. (TR 1002-03) Mr. Kinney had gone from describing his relationship with Complainant as "outstanding," to feeling that she should be removed from P.S. 3 (TR 988-91, 1000), all because she raised a number of safety concerns. Similarly, Mr. Read testified that the January 8, 1997 meeting was "great" and that all the problems were resolved (TR 875), however, he later cited these same issues as the reasons for the non-selection and lay off. (TR 741; CX 15) Additionally, Earl Hall, a quality engineer and member of DUP team, described Complainant as "professional, conscientious and knowledgeable," as well as a "team player." (TR 311-12) I also find it highly significant, and strong evidence of discriminatory intent, that Complainant was not just told she was a "team player," but also refereed to as "militant," and a "whistleblower." I find these comments are directly referring to Complainant's protected activity, and not general disagreements or personality conflicts.

I also reject the statements of Mr. Scheele and Ms. Stinson concerning Complainant not being a team player. Mr. Scheele testified to his conflicts with Complainant over the red-line issue, and stated that she was not a team player, however, Mr. Scheele admitted that he was not following Alyeska's instructions and would modify the red-line logs for his own purposes. (TR 1101-02) Thus, I find and conclude that Complainant's concerns were not only valid, but Mr. Scheele's comments were mere expressions of annoyance of being challenged when he, admittedly, was not following the delineated procedures.

Ms. Stinson, of the DUP team, stated that Complainant was not a team player because of the conflicts that arose over the computer password, and office locks. I reject this for a number of reasons. First, Ms. Stinson testified that the issue was resolved by December 1996, and yet she still raised the concern to VECO. Second, I find that Complainant's understanding and concerns regarding the computer protection procedures were reasonable under the circumstances. Ms. Stinson was told to request the passwords from the ATLs, yet she never did. Finally, regardless of Ms.

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[98] This case is easily distinguished from **Sellers v. Tennessee Valley Authority**, 1990-ERA-14 (Sec'y Apr. 18, 1991), **aff'd**, 959 F.2d 972 (11th Cir. 1992), where the Secretary found a legitimate reason where the complainant was argumentative in nature. In **Sellers**, the complainant had a history of recurring work-related problems both before and after engaging in protected activity. In the present case Mr. Kinney testified as to how well he got along with Complainant prior to her raising the minor modification issues, while ATL Haines, and Mr. Read testified that previous problems were resolved.

Chamberlain's questionable authority on this matter, Complainant clearly and reasonably told anyone requesting her password to merely follow what she perceived as the proper channels.

Finally, I find it suspicious that Mr. Read and Mr. Rooney received a great deal of concerns during the December meeting, and used those concerns as a basis for not selecting Complainant for the down-graded positions, yet, they never sought any verification or clarification of any of the concerns raised by Alyeska employees. I find this disregard for the factual basis of these complaint evidence that they served as pretext for removing Complainant from her position. Further, Mr. Read, in both the December and January meetings with Complainant, never gave her instructions on what she could do to smooth over the conflict with the Engineers and become more of a team player. Complainant, consequently, reasonably believed that the only way she could be more of a team player, was by silencing her safety concerns. Therefore, I find and conclude that Respondents' arguments that Complainant was difficult and "not a team player" was really the manifestation of their frustration that Complainant was engaging in protected activity, and I further conclude that Complainant has successfully proven intentional discrimination.

I similarly reject Respondents' "supervision" arguments, and I agree with Complainant that this was an illegitimate motive and evidence of intentional discrimination. While Respondents highlight Complainant's need for supervisor for the reason she was not selected for the down-graded positions and eventually laid off, I find that several uncontested facts exist. First, Mr. Read testified that he learned of the need for increased supervision of Complainant in December of 1996. At no point between December 1996 and March 1997, however, was Complainant afforded greater supervision at P.S. 3. Further, in August of 1997, Complainant was rehired to a position at remote Pump Station 7. In that position, Complainant was not provided with direct supervision until May of 1998. (TR 1280-81) Finally, I note that the basis for Mr. Read's opinion that Complainant needed greater supervision were the complaints made by the Alyeska employees; the same complaints I have previously rejected as being based on illegitmate, discriminatory motives in retailiation for Complainant's engaging in protected activity. Thus, I find and conclude that the Respondents' proffered reason for not selecting Complainant for the down-graded positions to be pretext.

I find the present facts differ from the scenarios in cases like **Chavez v. Ebasco Serv., Inc.**, 1991-ERA-24 (Sec'y Nov. 6, 1992), where a complainant was laid off for a valid reason of lack of work. The present facts indicate that there was not a shortage of work, but rather a back-log of design work requiring Complainant's expertise.[99] Further, Complainant was the only person laid off as a result of the reorganization of the NBU, and both Respondents were well aware of Complainant's protected activity. Rather, the Respondents were threatened by Complainant's complaints, and feared that she was the "type to go to JPO." **See Blake v. Hatfield Electric Co.**,

[99] In the present case, Complainant was more than qualified for the downgraded positions, unlike in **King v. Tennessee Valley Authority**, 1980-ERA-1 (ALJ March 28, 1980), adopted (Sec'y May 20, 1980), where the respondent's refusal to hire the complainant was based upon both prior misconduct and the presence of a more qualified applicant.

1987-ERA-4 (Sec'y Jan. 22, 1992) (affirming an ALJ finding of pretext, relying heavily upon evidence of a supervisor commenting that Complainant used a regulatory commission as a threat).

This situation is similar to the case **Williams v. TIW Fabrication & Machining, Inc.**, 1988-SWD-3 (Sec'y June 24, 1992), where the respondents' proffered reason for laying off the Complainant, insufficient work, was determined to be pretext, because the evidence established that at that time the respondents were amassing a backlog of work calling for the complainant's skills, and irregularity in the notice and method used to lay off the complainant. It is universally agreed that Complainant was technically qualified for the down graded positions, and that the backlog issues was troubling Alyeska. Nevertheless, Complainant was not selected, and the position was not filled until much later.[100] Further, the method of the downgrade selection process, and notice of layoff is further suspect. Both Mr. Read and Mr. Ebersole testified that the method employed by the lay off was not usual or standard. The reason cited for this change in protocol was that fact that they testified that they did not expect anyone to by laid off; and in fact, Complainant was the only person laid off.

This Judge recognizes that whistleblower statutes do not restrict an employer in its management or operational decisions. **Bauch v. Landers**, 1979-SDW-1 (Sec'y May 10, 1979) (quoting the ALJ's R.D.O.). **See also Ray v. Harrington**, 1979-SDW-2 (Sec'y July 13, 1979). The statutes do not, and should not, preclude management from taking steps to assure and maintain the effectiveness of its staff in enforcing a particular environmental statute and the employer should not be faulted for mandating an adverse action, such as reassignment or termination or removal, to achieve this action. However, such is not the case under the present facts. The Respondents laid off an extremely able employee, about whom there were no complaints concerning her work ability, solely because she had engaged in protected activity. Complainant has met her burden by establishing that she engaged in protected activity by raising safety concerns to employees at VECO and Alyeska, as well as to the JPO. Almost immediately after beginning to voice concerns, the attitude toward Complainant changed. Upon raising issues as to the minor modification packages, Complainant was quickly stripped of her minor modification duties, which would frustrate even the most reasonable and safety conscious employee. Further, as Complainant raised issues and refused to perform work on incorrectly filed out red-line logs, she was immediately subject to harassment by the engineers. Engineers who had previously described her in positive terms, now referred to her as "militant," a "whistleblower," and an "800 pound elephant." The decisions and reasons why Complainant was not selected for a downgraded position were made, in large part, due to the complaints voiced by Alyeska employees, in response to Complainant's engaging in protected activity.

Finally, I must voice my objection to VECO's argument that there is no evidence of any discriminatory motive on its part. I find that this statement is hollow for the simple reason that Mr.

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[100] Respondents argue that there was a serious and immediate need for designers, yet Klinker, Complainant's 'replacement,' did not start at P.S. 3 for quite some time. Mr. Read testified that the designers were not instructed to be be at the P.S. immediately (TR 930), yet the February 17, 1997 prof from Mr. Rooney which created the downgraded positions stated that he hoped "to have these people in place by mid March." (CX 48)

Read candidly admitted that VECO would do what Alyeska wanted, and as such, VECO intertwined itself with, and was influenced by, the strong motive for discrimination held by Alyeska employees.

In summary, I note that Complainant was the only person laid off as a result of the reorganization, and the reasons offered were pretextual. While Respondents claimed that Complainant needed supervision, none was provided before her lay off, and when she was rehired, none was available for several months. Additionally, Respondents relied upon several inter-personal issues, such as the time cards, passwords and locks, which had been already settled, as grounds for actions taken in 1997. The complaints about the Complainant were tightly tied to her protected activity, and rather than displaying examples of a difficult or combative employee apart from protected activity, the complaints served as expressions of annoyance of having to deal with Complainant's safety concerns. Complainant's inability to be a "team player," was nothing more than a manifestation of her safety concerns, i.e., she would not go along with drafting because what they were doing was not safe, and I find and conclude that this is indicative of illegitimate motive.

I, very briefly, wish to touch upon the issue of dual motive analysis. Under dual motive analysis, a Respondent must establish, by a preponderance of the evidence, the existence of a legitimate reason for the taking of adverse employment action against a complainant, and that the Respondent would have taken the same action even if the employee had not engaged in protected conduct. **See Simon v. Simmons Foods, Inc.**, 49 F.3d 386, 389 (8th Cir. 1995); **Martin v. The Dept. of the Army**, 1993-SDW-1 (Sec'y July 13, 1995).

This Judge only reaches the dual motive analysis if I determine there is a legitimacy to the Respondents' stated reason for the adverse employment action, a conclusion which I have specifically rejected for the aforementioned reasons. Even so, I find and conclude the Respondents have failed to present sufficient evidence that they would have taken the same action if Complainant had not engaged in protected activity, because the evidence establishes that Respondents' actions and positions were motivated entirely in response to Complainant raising quality concerns.

III. Damages

I have found that Respondents Alyeska and VECO violated the employee protection provisions of the Toxic Substances Control Act, the Solid Waste Disposal Act, the Clean Air Act, and the Water Pollution Control Act. The Secretary of Labor is therefore empowered to order all appropriate remedies, including injunctive relief, compensatory damages, exemplary damages, and attorneys' fees and costs. In the present case, Complainant requests an award of lost wages, a cease and desist order, expungement of employee records, compensatory damages for emotional distress, exemplary damages, and attorney fees and costs.

Back Pay Liability

Complainant requests an award of back pay totaling $32,175.65 for the period from her lay off, on March 24, 1997, until commencement of her P.S. 7 position on August 15, 1997. Further, Complainant seeks reimbursement of $818.88 in COBRA payments made during this same period in order to continue her health insurance.

The "goal of back pay is to make the victim of discrimination whole and restore him to the position that he would have occupied in the absence of the unlawful discrimination." **Blackburn v. Martin**, 982 F.2d 125, 128 (4th Cir. 1992). Thus, an award of back pay is computed by determining the compensation that a complainant would have received had the respondent continued his or her employment and by offsetting this amount by any amounts earned in replacement jobs. **Johnson v. Old Dominion Security**, 1986-CAA-3 (Sec'y May 29,1991). Under the Ninth Circuit's standard in **E.E.O.C. v. Farmer Bros. Co.**, 31 F.3d 891, 902 (9th Cir. 1994) (citing **Galindo v. Stoody Co.**, 793 F. 2d 1502, 1517 (9th Cir. 1986)), premiums Complainant paid for a former employee's COBRA plan are reimbursable, as this was an "actual expense incurred" by the complainant. Once the plaintiff establishes the gross amount of back pay due, the burden shifts to the defendant to prove facts which would either negate the existence of liability or which would mitigate that liability. **NLRB v. Browne**, 890 F.2d 605, 608 (2nd Cir. 1989); **West v. Systems Applications Int'l**, 1994-CAA-15 (Sec'y Apr. 19, 1995).

Respondents argue that because Complainant has failed to mitigate her damages, her back pay award should be cut off or reduced. Specifically, Respondents argue that by rejecting the Anchorage offer, all liability for back pay ceases. Second, Respondents argue that between March and August of 1997, Complainant did not adequately seek alternate employment, and therefore did not mitigate her damages appropriately. Finally, Respondents argue that any award must be reduced to account for the two weeks of severance pay Complainant received. I shall now address each of these arguments individually.

First, Respondents argue that Complainant's rejection of the Anchorage offer prevents any recovery for back pay. As a general rule, an employee's rejection of an employer's offer of restatement ends liability for back pay or reinstatements. **Williams v. TIW Fabrication & Machining, Inc.**, 1988-SWD-3 (Sec'y June 24, 1992) ("Refusal of an unconditional offer of reinstatement to a substantially equivalent position constitutes a breach of the obligation to mitigate damages.") The Secretary has held, "Absent special circumstances, employee's rejection of employer's reinstatement offer ends liability for back pay or reinstatement." **Blackburn v. Metric Constr., Inc.**, 1986-ERA-4 (Sec'y Oct. 30, 1991) (citing **Giandonato v. Sybron Corp.**, 804 F.2d 120, 124 (10th Cir. 1086).

The key issue here is the factual determination of whether or not Complainant was offered, and turned down, a job in Anchorage. I have already found that Respondents have failed to present convincing evidence that Complainant was offered, and rejected, any such position. Thus, I conclude that absent sufficient proof of an Anchorage offer, I cannot eliminate Respondents' back pay liability.

Respondents next argue that Complainant did not adequately mitigate damages in her pursuit of alternate employment between March and August of 1997. I disagree.

The record contains evidence that Complainant sought employment, both with VECO at Alyeska sites, and with other employers during the relevant time period, yet received no offers. (VECO 51) I have found that Complainant's general letters dated June 18, 1997, June 27, 1997 and July 10, 1997, did not constitute applications for a wide range of position. Rather, I find that the record only contains evidence that Complainant only applied to two individual position. Nevertheless, I find and conclude that Complainant took sufficient steps during this period to seek alternate employment, and therefore, reasonably and adequately sought to mitigate her damages. Therefore, I will not reduce Respondents' liability for back pay on this ground.

Finally, Respondent VECO argued in its post-hearing filing, that any award for lost wages and back pay, must be reduced by the amount of severance pay Complainant received for the two weeks she worked during the VECO inspection. Specifically, VECO notes that Complainant completed a calendar log which indicated the hours Complainant lost due to her lay off. (VECO 56) In this exhibit, Complainant computed lost wages, excluding the period where she received severance pay, and thus the total for lost wages and overtime totals $28,023.81. (VECO 56) Accordingly, VECO argues that Complainant's request for $32,175.65 should be reduced by $4,151.84, representing the straight time plus overtime for the two weeks, based on the records Complainant kept. (VECO 56)

It is well settled that interim earnings at a replacement job are deducted from an award of back pay. **See Willy v. The Coastal Corp.**, 1985-CAA-1 (Sec'y June 1, 1994); **Williams v. TIW Fabrication & Machining, Inc.**, 1988-SWD-3 (Sec'y July, 24, 1991). I agree, and hereby reduce Complainant's request by that amount. I find and conclude Complainant is entitled to an award of back pay totaling $28,023.81, plus $818.88 for reimbursement of COBRA payments made between March and August of 1997 to continue her health insurance.

Interest on Back Pay

Back pay awards are designed to make whole an employee who has suffered economic loss as a result of an employer's illegal discrimination. The assessment of prejudgment interest is necessary to achieve this end. Prejudgment interest on back wages recovered in litigation before the Department of Labor is calculated, in accordance with 29 C.F.R. § 20.58(a), at the rate specified in the Internal Revenue Code, 26 U.S.C. § 6621. The employer is not to be relieved of interest on a back pay award because of the time elapsed during adjudication of the complaint. **See Palmer v. Western Truck Manpower, Inc.**, 85-STA-16 (Sec'y Jan. 26, 1990) (where employer has the use of money during the period of litigation, employer is not unfairly prejudiced). **Blackburn v. Metric Constructors, Inc.**, 86-ERA-4 (Sec'y Oct. 30, 1991). Accordingly, I hereby recommend that Complainant be awarded prejudgement interest on the award of back pay, as calculated under 26 U.S.C. § 6621.

Other Equitable Relief

Complainant also requests that Respondents, specifically VECO, cease from further retaliation and discrimination, and that negative reference in her employment record be expunged. Further, Complainant requests that the Respondents be ordered to post this decision and order. In support thereof, Complainant alleges that both Mr. Ebersole and Ms. Johnson have made incriminating statements in which Complainant is criticized for bringing this actions.

VECO argues that the allegations concerning Mr. Ebersole and Ms. Johnson are based on double hearsay, and provide no proof of any on-going retaliation, and therefore any order to cease further discrimination is unwarranted. Alyeska argues that these claims directly involve VECO, as they concerns statements made by VECO employees and Complainant's VECO employment records.

I conclude that it is not necessary to pass on the existence of any potential continuing or future discrimination at this time, as such a claim is not before this Judge. Nevertheless, it goes without saying that both Respondents should both cease, and refrain from engaging in, any discriminatory conduct against Complainant because of her protected activity. Further, I find that it is permissible to recommend that the Respondent's be ordered to post the Secretary's Decision and Order for a period of sixty (60) days. Finally, I recommend that Respondents be ordered to expunge from their records all negative memoranda or references to any of Complainant's activities found to be protected activity. **See McMahan v. California Water Quality Control Bd.**, 1990-WPC-1 (Sec'y July, 16, 1993).

Compensatory Damages

Complainant requested $50,000 in compensatory damages in light of her high blood pressure, anxiety and depression. (TR 241)

Compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment and humiliation. **See generally Deford v. Secretary of Labor**, 700 F.2d 281, 283 (6th Cir. 1983) (decided pursuant to the ERA); **Nolan v. AC Express**, 1992-STA-37 (Sec'y Jan. 17, 1995) (decided pursuant to an analogous provision of the STA). Where appropriate, a complainant may recover an award for emotional distress when his or her mental anguish is the proximate result of respondent's unlawful discriminatory conduct. **See Bigham v. Guaranteed Overnight Delivery**, 1995-STA-37 (ALJ May, 8, 1996) (adopted by ARB Sept. 5, 1996); **Crow v. Noble Roman's Inc.**, 1995-CAA-8 (Sec'y Feb. 26, 1996). **See also Blackburn v. Metric Constructors, Inc.**, 1986-ERA-4 (Sec'y Oct. 30, 1991). Complainant bears the burden of proving the existence and magnitude of any such injuries; although, as a caveat, it should be noted that medical or psychiatric expert testimony on this point is not required. **Crow v. Noble Roman's, Inc.**, 1995-CAA-8 (Sec'y Feb. 26, 1996); **Lederhaus v. Paschen**, 1991-ERA-13 (Sec'y Oct. 26, 1992); **Jones v. EG&G Defense Materials, Inc.**, 1995-CAA-3 (ARB Sept. 29, 1998).

It is appropriate to review other types of wrongful termination cases, as well as awards in other whistleblower decisions involving emotional distress, to assist in the analysis of the appropriate measure of compensatory damages in a whistleblower case. Accordingly, this is precisely what this

Judge has done. **See Smith v. Esicorp, Inc.**, 1993-ERA-16 (ARB Aug. 27, 1998) (wherein the Board reduced the ALJ's recommendation of $100,000 in compensatory damages to $20,000);[101] **Doyle v. Hydro Nuclear Services**, 1989-ERA-22 (ARB Sept. 6, 1996) (wherein the Board affirmed the ALJ's recommendation of $40,000 compensatory damages);[102] **Bigham**, **supra** (wherein the Board increased the ALJ's award of compensatory damages from $2,500 to $20,000 after reviewing the observations and accounts of complainant's emotional distress);[103] **Gaballa v. Atlantic Group, Inc.**, 1994-ERA-9 (Sec'y Jan. 18, 1996) (wherein the Secretary reduced the ALJ's recommended compensatory damage award from $75,000 to $25,000);[104] **Lederhaus v. Paschen**, 1991-ERA-13 (Sec'y Oct. 26, 1992) (wherein the Secretary reduced the compensatory award from a recommended amount of $20,000 to $10,000);[105] **McCuistion v. Tennessee Valley Auth.**, 1989-

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[101] The evidence established that the discriminatory conduct was limited to several cartoons lampooning complainant, complainant did not suffer loss of a job or blacklisting and did not incur financial losses, and evidence of mental and emotional injury was limited to his own testimony and that of his wife.

[102] The evidence which supported an award in this amount consisted of complainant's consulting physicians who prescribed anxiety and depression medications, as well as other medications for chest pain; a treating psychologist testified that respondent's discriminatory acts caused complainant's anxiety disorder and post-traumatic stress disorder and respondent failed to offer any countervailing evidence on causation; and that same psychologist testified complainant's wife and children noticed a radical change in complainant's behavior, a serious strain in the marital relationship, and that divorce proceedings were begun, although the couple did eventually reconcile.

[103] At hearing, complainant testified to his lowered self-esteem and uncommunicativeness, to his change in sleep and eating habits, and to the adverse effect on his marriage. He also testified that he was not interested in socializing, felt 'less than a man' because he could not support his family, and that the family experienced a sparse Christmas. Finally, complainant testified the family had to cancel their annual summer vacation and charge the credit cards to the limit. Complainant's wife testified she noticed complainant's withdrawal in the weeks after Christmas.

[104] The ALJ recommended a $75,000 compensatory damage award based on the treating psychologist's finding that complainant suffered from chronic stress, paranoid thinking, a general distrust of others, a lack of confidence in his engineering judgment, a fear of continuing repercussions, and a general feeling of apathy. The psychologist further testified complainant will forever suffer from a full-blown personality disorder and a permanent strain on his marital relationship. The Secretary reduced the award based on the fact that the same psychologist indicated this psychological state was caused in part by a co-respondent who had previously settled out of the case and that part of that settlement compensated for part of complainant's compensatory damages.

[105] In **Lederhaus**, the evidence established complainant remained unemployed for 5 ½ months after his termination, he was harassed by bill collectors, foreclosure was begun on his home and he was forced to borrow $25,000 to save the house. In addition, complainant's wife received calls at

ERA-6 (Sec'y Nov. 13, 1991) (wherein the Secretary increased compensatory damages from the ALJ's recommended award of $0 to $10,000);[106] **Blackburn v. Metric Constructors, Inc.**, 86-ERA-4 (Sec'y Aug. 16, 1993) (wherein the Secretary reduced the ALJ's recommended award of compensatory damages to $5,000).[107]

In **van der Meer**, **supra**, the complainant suffered little out-of-pocket loss: he lost no salary as a result of the leave of absence and there was no evidence of uncompensated medical costs. Other losses were non-quantifiable. The complainant was awarded, however, $40,000 in compensatory damages because the respondent took extraordinary and very public action against the complainant which surely had a negative impact on complainant's reputation among the students, faculty and staff at the school, and more generally in the local community; complainant was subjected to additional stress by the respondent's failure to follow the conciliatory procedures contained in its handbook and complainant testified that he felt humiliated.

I find and conclude that, based on the present facts in light of my review of analogous cases, Complainant is entitled to an award of $10,000 in compensatory damages. I base this award upon Complainant's compelling testimony regarding her high blood pressure, anxiety and depression, which

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work from bill collectors and her employer threatened to lay her off. Complainant had to borrow gas money to get to an unemployment hearing and experienced feelings of depression and anger. Complainant fought with his wife and would not attend her birthday party because he was ashamed he could not buy her a gift, the family did not have their usual Christmas dinner, and complainant would not go to visit his grandson. In fact, complainant cut off almost all contact with his grandson. The evidence revealed complainant became difficult to deal with and this was corroborated by testimony from complainant's wife and a neighbor. Complainant contemplated suicide twice.

[106] The evidence revealed the complainant was harassed, blacklisted, and fired. In addition, complainant lost his livelihood, he could not find another job, and he forfeited his life, dental and health insurance. The blacklisting and termination exacerbated complainant's pre-existing hypertension and caused frequent stomach problems necessitating treatment, medication, and emergency room admission on at least one occasion. Complainant experienced problems sleeping at night, exhaustion, depression, and anxiety. Complainant introduced into evidence medical documentation of symptoms, including blood pressure, stomach problems, and anxiety. Complainant's wife corroborated his complaints of sleeplessness and testified he became easily upset, withdrawn, and obsessive abut his blood pressure.

[107] The testimony of complainant, his wife, and his dad established complainant was of the opinion that firing someone was like saying that person is no good. The evidence also established complainant felt really in a low and that he relied on his dad to come out of depression. The termination affected complainant's self-image and impacted his behavior, which became short with his wife. The wife testified to the stress and emotional strain on the marital relationship and the father testified to complainant's pride and work ethic and the fact that complainant felt sorry for himself after the termination.

was either caused or exasperated by Respondents' actions. I have found that Complainant was wrongfully laid off and harassed because of her protected activity, and she remained out of work for several months. Complainant candidly testified that, while she had suffered from high blood pressure prior to the alleged discrimination, her blood pressure and anxiety increased due to the Respondents' actions. (TR 241-43) Further, Complainant testified that she has undergone treatment for depression during this period. (TR 241-42) Complainant did not present any medical evidence or the testimony of friends or family members to support her own testimony, however, this is not necessary. Rather, I conclude that Complainant's testimony alone is sufficient for a claim of compensatory damages to be upheld. I do note, however, that the present facts do not support Complainant's claim for $50,000 in compensatory damaged. Complainant's actual discrimination, and the evidence of her emotional pain and suffering, lack the severity found in those cases where an award of $20,000, or more, was granted. Instead, I find that Complainant's condition and circumstances are more in line with those cases limiting an award of compensatory damages to approximately $10,000. **See McCuistion v. Tennessee Valley Auth.**, 1989-ERA-6 (Sec'y Nov. 13, 1991).

Exemplary Damages

Complainant requests an award of exemplary damages of, at least, $50,000, in order to punish the conduct of Respondents in this matter.

The Toxic Substances Control Act provides for an award of exemplary damages "where appropriate." 15 U.S.C.§2622(b)(2)(B)(iv). An award of punitive damages is appropriate where "the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." **Smith v. Wade**, 461 U.S. 30, 56 (1983). Once the requisite state of mind has been found, "the trier of fact has the discretion to determine whether punitive damages are necessary, 'to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future.'" **Rowlett v. Anheuser-Busch, Inc**., 832 F. 2d 194, 205 (1st Cir. 1987) (citing **Smith**, 461 U.S. at 53-54); **see also Johnson v. Old Dominion Security**, 1986-CAA-3 (Sec'y May 29, 1991).

Complainant argues that exemplary damages are warranted in this situation, based upon an alleged history of discrimination by Respondent VECO, and the statements of current VECO employees threatening further discrimination. VECO challenges the validity and relevance of past claims of discrimination, and also questions the alleged statements regarding further discrimination. Alyeska notes that all allegations cited to by Complainant in support of an award of exemplary damages concern actions and statements by VECO employees. Accordingly, Alyeska argues that it should not be liable for any exemplary damages, absent a showing that Alyeska engaged in willful, wanton or reckless conduct.

Based upon the totality of this closed record, I find and conclude that an award of exemplary damages is appropriate under the present facts. First, I have found that both Respondents intentionally discriminated against Complainant because she engaged in protected activity. Complainant was harassed, lost her job, and suffered mental and emotional stress as a result. I, in

determining a punitive award is justified, do not rely upon any allegations of a history of discrimination or chilling effect.[108] Rather, I conclude that the present facts conclusively establish how both Respondents reacted to Complainant's safety concerns by removing her from duties where she had raised concerns, subjecting her to harassment, and pushing her out of her position, are sufficient to justify an award to both punish Respondents' actions, and deter future discrimination. Further, I also find that the alleged statements concerning future discrimination are unclear at best, and do not justify any heightened award for purposes of deterring future actions.[109] Finally, I do note, as a mitigating factor, the fact that Complainant was eventually rehired to VECO position at a remote pump site, working under an Alyeska contract.

Accordingly, I recommend, based upon the present facts, Complainant be awarded exemplary damages in the amount of $5,000, and each Respondent shall pay $2,500 to Complainant, in order to both punish their discriminatory actions against Complainant, and to deter future discrimination.

Attorney Fee & Costs

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[108] I find the statements made by Mr. Higgins, regarding a "chilling effect," are not persuasive in determining an award of punitive damages. I find that fact that Mr. Smith of ECP could not substantiate Mr. Higgins's claim, as well as the fact that Complainant testified that she was never discouraged from going to ECP, favor my rejection of any statements of Mr. Higgins as either mistaken or merely biased. Accordingly, I refuse to increase my award of exemplary damages in response to this questionable evidence of a prior history of discrimination.

[109] I conclude that the statements of Mr. Ebersole and Ms. Johnson, as indicated in the ECP investigation, fail to constitute evidence of a continuing discriminatory atmosphere sufficient to serve as grounds for an increased award of punitive damages, serving to deter Respondents from future discrimination.

First, I find that Mr. Ebersole's questioning of Mr. Peacock as to whether Complainant was going to be laid off, was adequately explained as an innocent inquiry based on a rumor. Further, I find Mr. Ebersole's alleged statements concerning the cost of litigation are too uncertain and unsubstantiated to serve as proof of a continued, discriminatory threat. Finally, I note that Ms. Johnson has specifically denied making a comment that she had performance problems with Complainant based on the amount of time Complainant spent on her ECP claim. I noted, however, that even if this statement were true, it would still not constitute proof of discriminatory intent. Even a whistleblower engaged in protected activity, must still perform her duties. It is not permissible for the alleged whistleblower to spend his or her workday preparing for his or her case. Accordingly, I reject the arguments and evidence submitted by Complainant in support of an increased award of exemplary damages based on continuing discrimination. I conclude that the statements in controversy have been adequately explained, and do not rise to the level of discriminatory intent that would lead this Administrative Law Judge to increase an award for punitive damages.

In the present case, Complainant has been represented, at some point in the proceeding, by three counsel: Billie Pirner Garde, Esq., Sarah L. Levitt, Esq., of Government Accountability Project, and Alene Anderson, Esq., of the Project On Liberty and The Workplace. Currently, this Court has the fee petition of Attorney's Levitt and Anderson, accompanied by a Declaration of Sarah L. Levitt, Esq., in support of said fee. Both Respondent VECO and Respondent Alyeska have filed timely objections to this fee.

Respondents' objections to Attorney Levitt's and Attorney Anderson's fee raise several important issues, one of which involve the 1998 Altman Weil Survey. Respondents request, in essence, that this Court take judicial notice of the 1998 Altman Weil Survey as to the hourly rates for Attorneys in the jurisdiction of Alaska and Washington.

As this Judge may take judicial notice of the survey, all of Complainant's counsel may file a memorandum addressing the propriety of taking judicial notice by this court. All counsel for Complainant will be provided two weeks from receipt of this Recommended Decision and Order to file their response. Thereafter, counsel for VECO and Alyeska shall have two weeks from receipt of Complainant's responses, to file their rebuttal.

Additionally, on December 23, 1998, Attorney Garde, Complainant's former counsel, requested time to file a fee petition. (ALJ EX 118) This Judge granted this request on December 23, 1998, permitting Attorney Garde to file her fee petition on either December 30, 1998, or within two weeks of the issuance of this Recommended Decision and Order. (ALJ EX 119) Attorney Garde, apparently, has decided to file her fee within two weeks of this order. Counsel for both Respondents have requested an opportunity to respond to Attorney Garde's fee. Accordingly, Attorney Garde is hereby **ORDERED** to file her attorney fee within two weeks from receipt of this Recommended Decision and Order. Thereafter, Counsel for Respondents are granted two weeks from receipt of Attorney Garde's petition to respond.

This Administrative Law Judge will then issue a Supplemental Recommended Decision and Order in which I shall award appropriate attorney fees, and address all the arguments of counsel.

IV. RECOMMENDED ORDER

Based upon the foregoing findings of fact, conclusions of law and upon the entire record, this Judge **RECOMMENDS** the following **PRELIMINARY ORDER**:

1) Respondents, Alyeska Pipeline Service Company and VECO Engineering, shall pay to Complainant an award of $28,023.81 in back pay, plus $818.88 in reimbursement for COBRA payments. Further, I recommend that Complainant be awarded prejudgement interest on the award of back pay, as calculated under 26 U.S.C. § 6621.

2) Respondents shall immediately expunge Complainant's personnel file of any negative inferences related to her protected activity.

3) Respondents shall post on all bulletin boards, where Respondent's official documents are posted, a copy of the Secretary of Labor's Decision and Order for a period of sixty (60) days, ensuring it is not altered, defaced or covered by other materials.

4) Respondents shall pay Complainant compensatory damages in the amount of $10,000.00.

5) Each Respondent shall pay Complainant exemplary damages in the amount of $2,500.00.

It is **FURTHER RECOMMENDED** that

6) Complainant's second complaint, alleging a blacklisting/failure to hire claim, be **DENIED**.

Finally, I hereby **ORDER** all Counsel for Complainant to file a response to Respondents' attorney fee objections within two weeks of receipt of this Recommended Decision and Order. Further, Attorney Garde is hereby **ORDERED** to file her attorney fee within two weeks of her receipt of this order. Counsel for Respondents, upon receipt of Complainant Counsels' objections and Attorney Garde's fee petition, shall then have two weeks to respond. A Supplemental Recommended Decision and Order addressing the appropriate attorney fee shall be issue shortly thereafter.

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DAVID W. DI NARDI
Administrative Law Judge

Boston, Massachusetts
DWD:pte

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, U.S. Department of Labor, Frances Perkins Building, Room S-4309, 200 Constitution Avenue, N.W., Washington D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. **See** 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).